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EDITOR'S NOTE

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No. 86-1278-CFX
Status: GRANTED

Title: Hustler Magazine and Larry C. Flynt, Petitioners
v.
Jerry Falwell

Docketed:
February 2, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Isaacman,Alan L.

Counsel for respondent: Grutman,Norman Roy

Entry	Date	Note	Proceedings and Orders
16	Jun 12 1978	G	Motion of Reporters Committee for Freedom of the Press, et al. for leave to file a brief as amici curiae filed.
1	Feb 2 1987	G	Petition for writ of certiorari filed.
2	Feb 12 1987	G	Motion of Richmond Newspapers, Inc., et al. for leave to file a brief as amici curiae filed.
4	Mar 3 1987	G	Motion of Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae filed.
5	Mar 7 1987		Brief of respondent Jerry Falwell in opposition filed.
6	Mar 11 1987		DISTRIBUTED. March 27, 1987
7	Mar 25 1987	X	Reply brief of petitioners Hustler Magazine, et al. filed.
8	Mar 30 1987		Motion of Richmond Newspapers, Inc., et al. for leave to file a brief as amici curiae GRANTED.
9	Mar 30 1987		Motion of Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae GRANTED.
10	Mar 30 1987		Petition GRANTED.
			**********
12	Apr 22 1987		Order extending time to file brief of petitioner on the merits until June 15, 1987.
13	Apr 24 1987		Parties to file DEFERRED APPENDIX.
18	Jun 12 1987	G	Motion of Richmond Newspapers, Inc., et al. for leave to file a brief as amici curiae filed.
15	Jun 13 1987	G	Motion of Volunteer Lawyers for the Arts, Inc. for leave to file a brief as amicus curiae filed.
14	Jun 15 1987	G	Motion of Law and Humanities Institute for leave to file a brief as amicus curiae filed.
17	Jun 15 1987	G	Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae filed.
19	Jun 15 1987		Record filed.
20	Jun 15 1987	G	Motion of American Editorial Cartoonists, et al. for leave to file a brief as amici curiae filed.
21	Jun 15 1987	G	Motion of Association of American Publishers, Inc. for leave to file a brief as amicus curiae filed.
22	Jun 15 1987		Brief of petitioners Hustler Magazine, et al. filed.
24	Jun 15 1987	G	Motion of Home Box Office, Inc. for leave to file a brief as amicus curiae filed.
25	Jun 26 1987		Motion of Law and Humanities Institute for leave to file a brief as amicus curiae GRANTED.
26	Jun 26 1987		Motion of Volunteer Lawyers for the Arts, Inc. for leave to file a brief as amicus curiae GRANTED.
27	Jun 26 1987		Motion of Reporters Committee for Freedom of the Press, et al. for leave to file a brief as amici curiae GRANTED.

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32	Jun 26 1987		Motion of Home Box Office, Inc. for leave to file a brief as amicus curiae GRANTED.
33	Jul 22 1987		Brief of respondent Jerry Falwell filed.
34	Aug 13 1987		Joint appendix filed.
36	Oct 9 1987		CIRCULATED.
37	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 2, 1987. (1st case).
39	Nov 24 1987	X	Reply brief of petitioners Hustler Magazine, et al. filed.
40	Dec 2 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-1278

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,

Petitioners,

vs.

REVEREND JERRY FALWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Amendment defenses applicable to libel also apply to claims of intentional infliction of emotional distress when such claims are based upon alleged injurious falsehoods.

   A. Whether a parody containing critical commentary about a public figure plaintiff prominent in the nation's political life which a jury found could not reasonably be interpreted as making any statements of fact about the public figure consists of protected opinion or rhetorical hyperbole which is not actionable as intentional infliction of emotional distress.

   B. Whether a public figure plaintiff prominent in the nation's political life may recover substantial compensatory and punitive damages based upon publication of a parody containing critical commentary when he fails to prove by clear and convincing evidence that the parody was published with *New York Times v. Sullivan* "actual malice," i.e. knowledge of falsity or reckless disregard for the truth.

2. Whether a public figure prominent in the nation's political life may recover substantial compensatory and punitive damages because he suffered some hurt feelings due to critical commentary in a parody although it caused no harm to his reputation.

3. Whether a public figure plaintiff prominent in the nation's political life may recover substantial compensatory and punitive damages due to publication of a parody containing critical commentary based upon

the tort of intentional infliction of emotional distress when the only evidence of emotional distress consists of evidence that the plaintiff was angered and that his optimism and enthusiasm were diminished.

A. Whether the Court below correctly found that such evidence was sufficient to meet the requirement of the tort that the plaintiff's emotional distress be severe.

B. Whether the First Amendment permits an award of substantial compensatory and punitive damages based upon such a showing of emotional damage.

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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. AND LARRY C. FLYNT,

Petitioners,

vs.

REVEREND JERRY FALWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

Petitioners Hustler Magazine, Inc. and Larry Flynt, *by counsel*, petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the case of *Falwell v. Flynt*, No. 85-1417(L) on said Court's docket.

THE PARTIES

Petitioners (defendants below) are Hustler Magazine, Inc. and Larry Flynt, the corporate and individual publishers, respectively, of *Hustler* Magazine.[1] Respondent (plaintiff below) is the

---

[1]Hustler Magazine, Inc., a California corporation, is a corporation affiliated with L.F.P., Inc., a California corporation.

Reverend Jerry Falwell.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 797 F.2d 1270 (4th Cir. 1986); a copy is appended as Appendix A. The order denying rehearing *en banc*, together with the dissenting opinions of five of the eleven judges of the United States Court of Appeals for the Fourth Circuit, is reported at 805 F.2d 484 (4th Cir., *en banc*, 1986); a copy is appended as Appendix B. The unreported opinion of the United States District Court for the Western District of Virginia, which denied a motion for judgment notwithstanding the verdict, is appended as Appendix D.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was dated August 5, 1986. The Court denied petitioners' petition for rehearing *en banc* on November 4, 1986. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right

> of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This lawsuit was filed by one of the nation's most well-known public and political figures, Jerry Falwell, based upon the publication in *Hustler* Magazine of a parody featuring his name and likeness. The ad parody, a copy of which is appended hereto as Appendix E, was accurately described by the Court of Appeals in its opinion:

> The "ad parody" which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about their "first time." They mean, their first encounter with Campari Liqueur, but there is double entendre with a sexual connotation. In the *Hustler* parody, Falwell is the celebrity in the advertisement. It contains his photograph and the text of an interview which is attributed to him. In this interview Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and Falwell appears as a hypocrite and habitual drunkard. At the bottom of the page is a disclaimer which states "ad parody - not to be taken seriously." The parody is listed in the table of contents as "Fiction; Ad and Personality Parody."

App. A at A3-4.

The Complaint, as originally filed in the United States District Court for the Western District of Virginia, alleged libel, invasion of privacy, and intentional infliction of emotional distress. Jurisdiction was based upon diversity of citizenship. At trial the Court granted a directed verdict on the claim of invasion of privacy. The jury returned a verdict for the defendants on the libel claim, specifically finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. [App. C at C1.] However, the jury found that defendants had intentionally inflicted emotional distress upon Falwell and awarded him $100,000 in compensatory damages. [*Id.* at C3.] The jury also awarded $50,000 in punitive damages against each of the two defendants. [*Id.* at C4.] Thus, Falwell obtained a judgment in the amount of $200,000. (The jury returned a verdict in favor of a third defendant, Flynt Distributing Company, Inc., on both claims which were submitted to the jury.)

The only evidence relating to emotional distress suffered by Falwell was his own testimony that he was very angry[2] and "felt like weeping," but did not,[3] and the testimony of a close associate, Dr. Ron Godwin, that "in subtle ways" Falwell's demeanor and behavior had been affected, although Godwin could not articulate how they had been affected,[4] that "a certain degree" of Falwell's "enthusiasm and optimism, ability

[2]Joint Appendix on Appeal 793.
[3]*Id.* 794.
[4]*Id.* 946.

to concentrate, to focus on the myriad details of organizations such as [Moral Majority] . . . was diminished,[5] and that Falwell was "preoccupied."[6]

In contrast to this testimony relating to emotional distress, Falwell admitted that his busy schedule had not been cut back at all as a result of his emotional distress[7] and that he had continued to follow a regime in which he worked from 5:45 a.m. to midnight or 1:00 a.m. and travelled 400,000 miles and gave 1200 speeches per year,[8] a schedule which Godwin described as "exhausting."[9] He had not sought any form of counselling to deal with his emotional distress[10] and was used to being subjected to criticism by various publications.[11] Godwin admitted that Falwell exhibited no "overt emotion" in response to the parody.[12]

Post-trial, Petitioners moved for judgment notwithstanding the verdict. The District Court denied the motion on April 19, 1985. [App. D.] Petitioners appealed to the United States Court of Appeals for the Fourth Circuit and argued, *inter alia*, that the law of libel provided the exclusive remedy for Respondent and its defenses and protections could not be evaded by pleading intentional infliction of emotional distress; that because the ad parody was not published with *New York Times v. Sullivan* actual malice, i.e. knowing or

[5]*Id.*
[6]*Id.* 943.
[7]*Id.* 807.
[8]*Id.* 765.
[9]*Id.* 941.
[10]*Id.* 806
[11]*Id.* 814.
[12]*Id.* 948.

reckless falsity, the First Amendment barred recovery under the theory of intentional infliction of emotional distress; that because the ad parody constituted opinion and rhetorical hyperbole, the First Amendment barred recovery under the theory of intentional infliction of emotional distress; and that Respondent had not proved the elements of the tort of intentional infliction of emotional distress, including the requirement that Respondent's emotional distress be severe.

The Court of Appeals affirmed the judgment below. Petitioners petitioned for rehearing *en banc*. On November 4, 1986, the Court sitting *en banc* denied the petition for rehearing by a vote of 6 to 5. Two dissenting opinions were filed and are appended with the order as App. B.

REASONS FOR GRANTING THE WRIT

I

First Amendment Defenses Applicable to Libel Must Also Apply To Claims of Intentional Infliction of Emotional Distress When Such Claims Are Based Upon Alleged Libels

Although the Court of Appeals recognized that the First Amendment must be considered when ruling upon Respondent's claim of intentional nfliction of emotional distress, the Court found that First Amendment considerations were satisfied by application of the tort's common law requirement of intentional conduct. The Court therefore rejected the defense that the parody was published without actual malice as defined in New *York Times Co. v. Sullivan*, 376

U.S. 254 (1964), i.e. without 'knowledge of falsity or reckless disregard for the truth," as well as the defense that the parody consisted of protected opinion and rhetorical hyperbole. App. A at A7-A11.

The Court of Appeals thus brought itself directly in conflict with the decisions of other circuit courts of appeals, as well as the decisions of the supreme court of at least one state, relating to issues of federal constitutional law. *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983) (rhetorical hyperbole defense applies to both libel and intentional infliction of emotional distress claims); *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979)(actual malice requirement applies to both libel and intentional infliction of emotional distress claims); *Blatty v. New York Times Co.*, 42 Cal.3d 1033 (1986)(actual malice requirement applies to all claims based upon injurious falsehood); *Reader's Digest Ass'n v. Superior Court*, 37 Cal.3d 244, 690 P.2d 610, 208 Cal.Rptr. 137 (1984), *cert. denied*, ____ U.S. ____ , 106 S.Ct. 3307 (1986)(actual malice requirement applies to both libel and intentional infliction of emotional distress claims).

Moreover, the Court of Appeals departed from the clear teachings of this Court that First Amendment protection does not depend upon the label which state law chooses to affix to a claim. Thus, in *New York Times Co. v. Sullivan*, 376 U.S. 254, (1964), this Court stated:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere

> labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.
>
> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.

Id. at 289 (citation omitted). Earlier, in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), the Court had observed that "a State cannot foreclose the exercise of constitutional rights by mere labels." *Id.* at 429. Thus, the protection of the First Amendment extends to any theories of liability which might result in the repression of free speech. As the Court commented in *Sullivan*, the First Amendment represents

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. at 270. To permit a tort plaintiff to inhibit such robust, wide-open debate is impermissible whether the plaintiff pleads libel, intentional infliction of emotional distress, or any other theory of liability.

Thus, the California Supreme Court recently observed that 'Not only does logic compel the

conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated 'defamation,' they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than 'defamation' to their injurious falsehood claim—a task that appears easy to accomplish as a general matter—and thereby avoid the operation of the limitations and frustrate their underlying purpose." *Blatty v. New York Times Co., supra*, 42 Cal.3d at 1044-1045 (parenthetical matter deleted). Respondent has done exactly that which the California Supreme Court warned against: in addition to suing on his failed libel claim, he also claimed intentional infliction of emotional distress based upon the same alleged injurious falsehood in an attempt to avoid the First Amendment and common law defenses applicable to his libel claim.

The concern over such alternative pleading is not mere unsupported speculation, as the court observed in *Blatty*. In recent years it has become common practice for plaintiffs in libel suits to plead alternative theories of relief such as intentional infliction of emotional distress. *Id.* at 1045. See Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24 (1983). Indeed, since the jury verdict was rendered in this case Petitioners have experienced a number of cases in which plaintiffs with libel claims have now added causes of action for intentional infliction of emotional distress.

Nor is the concern over such "end runs" around constitutional protections for libel confined to defendants such as Petitioners. As Judge Wilkinson observed in his dissent to the order denying a rehearing *en banc*, permitting claims of intentional infliction of emotional distress to go forward in cases such as this threaten "the long tradition of satiric commentary" in political debate. [App B at B9.] Political cartoonists in particular would be threatened by such a development. One of the nation's leading editorial cartoonists, Paul Conrad, expressed the danger with his drawings more eloquently than is possible with mere words in an editorial cartoon which appeared shortly after the jury's verdict in this case. See App. F. Other prominent members of the press have also expressed their concern. See Henry Mitchell, *Falwell, Flynt and Flying Fur*, Washington Post, Dec. 7, 1984, at D2; Editorial, *Where Censorship Starts*, Los Angeles Times, Dec. 13, 1984; Ellen Goodman, *Flynt Was Wronged*, Washington Post, Dec. 15, 1984, at 23.

As Ellen Goodman observed, "If this decision stands . . . , any satirist or would-be humorist had better watch out for nastiness. Good-bye Saturday Night Live. Hello, pabulum." *Id.* The Los Angeles Daily News noted that under the Fourth Circuit's rule, it would not be inconceivable that Vice President Bush could put *Doonesbury's* Garry Trudeau out of business inasmuch as he has claimed that reading attacks on himself in the comic strip makes him a "basket case for the rest of the day." Editorial, *Flynt, Falwell and Free Speech*, Los Angeles Daily News, Dec. 14, 1984. Indeed, Vice President Bush's remark evidences greater damage than that which Respondent was able to prove at trial.

In *New York Times v. Sullivan, supra*, the Court devoted an extensive discussion to the Alien and Sedition Acts and noted that "the attack on its validity has carried the day in the court of history." 376 U.S. at 276. The Court then noted that what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. *Id.* at 277. Yet the result of the opinion below is to permit civil liability to attach in exactly the situation which this Court condemned when it discussed the Alien and Sedition Acts. It is noteworthy that one of the victims of prosecution under these acts, Luther Baldwin, was prosecuted simply for expressing an off-color, critical but humorous remark about President Adams. As the Jeffersonian Republican press noted in coming to Baldwin's defense, his prosecution proved 'that joking may be very dangerous even to a free country." J. Smith, *Freedom's Fetters* 274 (1956)(quoting *Argus*, Nov. 15, 1799).

Similarly, the lesson of the opinion of the Fourth Circuit herein is that joking about a public figure may also be very dangerous. The nation's long tradition of "uninhibited, robust, and wide-open" debate which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *New York Times v. Sullivan, supra*, at 270, should not permit punishment for such satirical criticism, even when in questionable taste.

Petitioners are aware of only two reported opinions which have discussed the Court of Appeals opinion below, and both opinions were critical of the Fourth Circuit's approach. In *Ault v. Hustler Magazine, Inc.*, 13 Med.L.Rptr. (BNA) 1657 (D.Ore. Oct 20, 1986), the

Court rejected the Fourth Circuit's approach and concluded that "the better reasoned cases support dismissing an action for the intentional infliction of emotional distress when the action is based on the same facts which support the plaintiff's defamation claim." *Id.* at 1662. See also *Flynn v. Higham*, 149 Cal.App.3d 677, 681, 197 Cal.Rptr. 145 (1983).

In *Blatty v. New York Times Co.*, 42 Cal.3d 1033 (1986), the California Supreme Court recently rejected the Fourth Circuit's holding in this case. The plaintiff therein had argued that in support of his claim of intentional interference with prospective economic advantage based upon an injurious falsehood, he did not have to prove *New York Times v. Sullivan* "actual malice." The plaintiff relied upon the Fourth Circuit's opinion herein. The California Supreme Court rejected this contention, noting:

> Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the teaching of *New York Times*. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity (376 U.S. at pp. 279-280)—even though state law did not require him to do so (*id.* at p. 262). Indeed, in that case the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The *Falwell* Court misses this crucial point and as a result cannot be followed.

42 Cal.3d at 1047-1048.

Judge Wilkinson's dissent (App. B at B4-B15) eloquently expresses the dangers of permitting recovery for emotional distress in the absence of libel. See also Note, *First Amendment Limitations on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 Columbia L.Rev. 1749 (1985).

A. Opinion and Rhetorical Hyperbole are Constitutionally-Mandated Defenses to a Claim of Intentional Infliction of Emotional Distress Made by a Public Figure Plaintiff Prominent in the Nation's Political Life Based Upon a Critical Commentary in a Parody

This Court has long recognized that opinion and rhetorical hyperbole constitute protected speech under the First Amendment and cannot give rise to a cause of action for civil liability. In *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970), the Court reversed a libel judgment on the ground that a newspaper's use of the term "blackmail" to describe a public figure's negotiating position was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." *Id.* at 14. This conclusion was based on the fact that no reader could have thought that the plaintiff was actually being charged with the crime of blackmail. *Id.*

In the case at bar, the jury's unchallenged finding that the parody could not reasonably have been interpreted as stating actual facts about Respondent requires a similar finding that the statements in question are rhetorical hyperbole. As this Court stated, "To permit the infliction of financial liability upon the

petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Id.*

This Court again recognized the First Amendment protection for rhetorical hyperbole in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974). *Letter Carriers* was an action under the Virginia 'insulting words" statute, based upon the defendant labor union's characterization of a non-union employee as a "scab" and defining a scab as a "traitor" having "rotten principles" and lacking character. *Id.* at 267, 283. The Court held that such use of epithets "cannot be construed as representations of fact," *id.* at 284, but was merely "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286. The court noted that use of such words might be actionable if used in such a way as to convey a false representation of fact. *Id.*

By permitting Respondent to recover damages for emotional distress based upon similar rhetorical hyperbole and lusty, imaginative expressions,[13] the Fourth Circuit implicitly rejected the teachings of *Greenbelt* and *Letter Carriers*. This Court did not limit the First Amendment defense of opinion or rhetorical hyperbole to libel claims. As noted above, the First

[13]Publications such as editorial cartoons, which are similar in nature to the ad parody here in question, have been held to be protected as rhetorical hyperbole. See *Keller v. Miami Herald Pub. Co.*, 778 F.2d 711 (11th Cir. 1985).

Amendment applies to all claims based upon exercise of freedom of expression.

The decision below directly conflicts with the decision of the Tenth Circuit in *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). In *Pring*, as in this case, the plaintiff alleged libel, invasion of privacy, and intentional infliction of emotional distress. In both cases, the plaintiff was identifiable as the subject of a fictional account. In *Pring*, the court enunciated the test which was applied by the jury in this case in determining whether the ad parody was libelous:

> whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.

Id. at 442. The Court held that this test was mandated by the First Amendment protections accorded to opinion or "rhetorical hyperbole." (Citing *Greenbelt* and *Letter Carriers*.) The identical test has been followed by the Ninth Circuit, *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986). See also *Ollman v. Evans*, 282 App.D.C. 301, 750 F.2d 970, 984 (D.C.Cir. *en banc* 1984), *cert. denied*, ____ U.S.____ , 105 S.Ct. 2662 (1985); *Myers v. Boston Magazine, Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980). This test was also incorporated into the jury instructions given by the court below on Respondent's libel claim. The jury, applying this test below, found that the ad parody could not reasonably understood as describing actual facts about Reverend Falwell or actual events in which he participated. [App. C at C1.] Respondent did not challenge this finding or the judgment against him on his libel claim.

The Tenth Circuit also held that "the same First Amendment considerations must be applied" to Pring's claim of intentional infliction of emotional distress (called "outrageous conduct" in Wyoming), and therefore refused to entertain her appeal from the dismissal of that claim for the same reason that it reversed her judgment for libel. *Pring*, 695 F.2d at 442. Thus, the test requiring that the publication be reasonably understood as describing actual facts about the plaintiff or actual events in which he participated applies, as a matter of constitutional law, to emotional distress claims as well. *Accord: Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 557, 558, 216 Cal.Rptr. 252 (1985).

In the case at bar, the Court of Appeals casually dismissed the opinion defense in this case by stating, "We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress." App. A at A11. The Court therefore concluded that *outrageous* opinion is not entitled to First Amendment protection, despite this Court's numerous pronouncements to the contrary. In words which have been quoted in virtually every libel case since 1974, this Court pronounced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974):

> Under the First Amendment there is no such thing as a false idea. *However pernicious an opinion may seem*, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. [Emphasis added.]

In ignoring the opinion defense simply because it found the opinions expressed in the parody outrageous, the Court of Appeals wrote the First Amendment out of the tort of intentional infliction of emotional distress. If this ruling is permitted to stand, the defense of opinion or rhetorical hyperbole will be rendered useless and the law of libel will be rendered obsolete, superseded by the new emotional distress tort which will be free of any constitutional baggage.

B. To Recover Substantial Compensatory and Punitive Damages For Emotional Harm Based Upon Publication of a Parody Containing Critical Commentary, a Public Figure Plaintiff Prominent in the Nation's Political Life Must Prove by Clear and Convincing Evidence that the Parody was Published With Knowledge of Falsity or Reckless Disregard for the Truth

This Court has held that the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to harm *by publishing a falsehood about the public figure*. In *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), the Court stated:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like Louisiana's, *permitting a finding of malice based on an intent merely to inflict harm, rather*

> *than an intent to inflict harm through falsehood*, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, *Defamation of Public Officers and Candidates*, 49 Col.L.Rev. 875, 893 (1949). Moreover, "in the case of charges against a popular political figure * * * it may be almost impossible to show freedom from ill-will or selfish political motives." *Id.*, at 893, n. 90.

379 U.S. at 73-74 (emphasis added; ellipsis in original). Thus, this Court recognized that the interest in fostering the robust debate which is at the cornerstone of our society bars the states from imposing liability for critical comments about public figures unless such comments are made with an intent to communicate false assertions of fact.

In the case at bar, the Court of Appeals reasoned that although the First Amendment requires a finding of malice in order for a public figure to prevail on a claim of intentional infliction of emotional distress, the "knowing or reckless falsity" standard was inapplicable because falsity is not an element of that tort. App. A at 10. Thus, the Court of Appeals concluded that First Amendment considerations would be satisfied if the defendant's intentional or reckless conduct has proximately caused emotional distress. *Id.* at A11.

This totally ignores the teachings of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *Sullivan* held that speech about a public official may not be subject to liability unless there is clear and convincing evidence that it was made with "actual

malice," i.e. knowledge of its falsity or reckless disregard for the truth. This was extended to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The actual malice requirement is not confined to libel suits, but to any suits attempting to impose civil liability upon critical commentary about public figures. Thus, this Court held that knowing or reckless falsehood must be proved in invasion of privacy cases. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

Invasion of privacy, like intentional infliction of emotional distress, is concerned with mental distress rather than injury to reputation. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983), citing *Time, Inc. v. Hill, supra*, 385 U.S. at 384 n.9. Thus, if the Court of Appeals' analysis herein were correct, a public figure plaintiff should be able to recover damages for invasion of privacy simply by proving intentional conduct by the defendants, without having to prove knowing or reckless falsity.

The logic of the cases requiring a showing of knowing or reckless falsity in invasion of privacy cases requires a similar showing in cases involving intentional infliction of emotional distress. The decision below conflicts with this constitutional principle. Moreover, it is in direct conflict with holdings of the Seventh Circuit and of at least one state supreme court.

In *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979), the Seventh Circuit denied relief on a count for intentional infliction of emotional distress, among others, because the court had already concluded that there was no cognizable defamation claim due to a lack of *New York Times v. Sullivan* actual malice. The court concluded,

"We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused." 579 F.2d at 1035. The court rejected the notion that "malice or other improper intent" was a sufficient basis for liability: "Where the constitutional right to free speech is involved, as it is here, the *New York Times* standard would be applicable to such an intent inquiry." *Id.* at 1036 n.16.

The California Supreme Court came to a similar conclusion in *Reader's Digest Ass'n v. Superior Court, supra*, 37 Cal.3d 244 (1984). After holding that a libel claim must fail because the alleged libel was not published with knowing or reckless falsity, the Court addressed the claims of intentional infliction of emotional distress and invasion of privacy:

> Each of these additional causes of action are based upon the same facts as the cause of action for libel. Our conclusion that the plaintiffs have failed to show a triable issue of fact as to actual malice requires summary judgment on every claim based upon the publication of the Reader's Digest article.
>
> The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without liability. That constitutional protection does not depend on the label given to the stated cause of action (see *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 269); it bars not only actions for defamation, but

> also claims for invasion of privacy (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 387-388; *Goldman v. Time, Inc.* (N.D.Cal. 1971) 336 F.Supp. 133, 137-138; *Kapellas v. Kofman* (1969) 1 Cal.3d 20,. 35 fn. 16). Dederich's cause of action for intentional infliction of emotional distress presents an issue of first impression, but fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.

Thus, the First Amendment protects speech about public figures unless it is made with knowing or reckless falsity, regardless of the label which a plaintiff chooses to affix to his claim.

The Court of Appeals herein converted this inquiry about defendant's subjective awareness of falsity into a simple inquiry about malice and Intent to harm. [App. A at A11.] As noted above, this Court had already rejected such a standard in *Garrison v. Louisiana, supra*, and other cases. See, e.g., *Letter Carriers v. Austin, supra*, 418 U.S. at 281 ('Ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard."). Similarly, in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), an invasion of privacy case, the Court noted that the actual malice test in such a case was *not* satisfied by common law malice, "frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights." Rather, the test even in a privacy case focuses on the defendant's attitute toward the truth or falsity of the material

published. 419 U.S. at 252. The same is obviously true when the plaintiff alleges intentional infliction of emotional distress.

Clearly, Petitioners did not publish the ad parody in this case with knowing or reckless falsity. The ad parody did not make any false statements of fact about the plaintiff. The jury so found, and Respondent did not challenge this finding. As the Court stated in *Letter Carriers v. Austin, supra*, 418 U.S. at 284, "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact."

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court observed that the actual malice standard "exacts a correspondingly high price from the victims of defamatory falsehood. Plainly, many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id.* at 342. The Court of Appeals' test, based solely upon intent, is constitutionally inadequate.

II

A Public Figure May Not Recover Substantial Compensatory and Punitive Damages Simply Because He Suffered Some Hurt Feelings Due to Critical Commentary in a Parody Although It Caused No Harm to his Reputation

A number of courts have held that the tort of intentional infliction of emotional distress may not be utilized to recover damages when the gravamen of the complaint is really that of libel. See *Ault v. Hustler*

Magazine, Inc., supra, 13 Med.L.Rptr. (BNA) 1657; *Flynn v. Higham, supra*, 149 Cal.App.3d 677; *Todd v. South Carolina Farm Bureau Mutual Insurance Company*, 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985). One of the most recent jurisdictions to adopt this rule was New York, whose highest court stated, "It would be improper to permit plaintiff to evade the specific prerequisites for a libel action by presenting his cause of action in terms of the generalized tort of intentional infliction of emotional distress." *Wilson v. Merrill Lynch, Pierce, Fenner & Smith*, 66 N.Y. 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297 (1985).

Petitioners submit that the Court of Appeals incorrectly concluded that Virginia would recognize the tort of intentional infliction of emotional distress arising out of the same facts as a defective libel claim. Moreover, Petitioners submit that the First Amendment forbids the use of the tort of intentional infliction of emotional distress as a substitute for libel, especially when the claim is brought by a public figure or public official. As this Court noted in *New York Times v. Sullivan, supra*, public officials must be "men of fortitude, able to thrive in a hardy environment." 376 U.S. at 273. Perhaps President Truman expressed the thought most aptly when he stated, "If you can't stand the heat, get out of the kitchen." Personages such as Respondent who voluntarily choose to place themselves before the public as paragons of virtue and who enjoy immense power in the political life of the nation must be expected to endure the rough and tumble life of political debate. Unless subjected to false statements of fact, in which there is no constitutional value, they should be expected to have toughened their hides to

withstand the insult and invective that often accompanies heated comment on the issues of the day. "[V]ehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" often seem necessarily to accompany our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270. The First Amendment does not ask too much of public officials and public figures such as Respondent if it requires them to limit their remedies for harsh words to situations in which they are the subjects of defamatory falsehoods.

Indeed, even in the absence of First Amendment considerations the tort of intentional infliction of emotional distress requires a high threshold before a plaintiff can recover. As comment d to Section 46 of the Restatement (Second) of the Law of Torts (governing intentional infliction of emotional distress) notes, "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."

III

A Public Figure Prominent in the Nation's Political Life Must Prove that He Has Suffered Severe Emotional Distress In Order to Recover Damages for Intentional Infliction of Emotional Distress Based upon Critical Commentary in a Parody

As noted in the Statement of the Case (*supra* at 4-5), plaintiff's evidence of emotional distress was limited to his own testimony that he was angry and "felt like weeping" and the testimony of a close colleague that his enthusiasm and optimism were somewhat diminished in subtle ways. Such damages are insufficient to justify the recovery of substantial compensatory and punitive damages based upon critical commentary about a public figure. Neither the common law of Virginia nor the First Amendment permit such an award.

Comment (j) to Section 46 of the Restatement (Second) of Torts (governing the tort of intentional infliction of emotional distress) states the degree of emotional distress which must have been suffered in order to recover:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises.* Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure*

> *it*. The intensity and the duration of the distress are factors to be considered in determining its severity.

(Emphasis added.) Indeed, comment (k) notes that "normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm which in itself affords evidence that the distress is genuine and severe."

Virginia courts have followed the Restatement and have adopted the requirement that in order to recover for intentional infliction of emotional distress, the distress must be "severe." See *Morgan v. American Family Life Assurance Co. of Columbus*, 559 F.Supp. 477 (W.D.Va. 1983); *Naccash v. Burger*, 223 Va. 406, 416, 290 S.E.2d 825 (1982); *Moore v. Allied Chemical Corp.*, 480 F.Supp. 364, 369-70 (E.D.Va. 1979).

The evidence of plaintiff's emotional distress in the case at bar was utterly insufficient to cross this threshold. To permit Respondent to recover substantial compensatory and punitive damages based upon such a showing is to invite all public figures and public officials to fabricate vague claims of emotional upset in order to recover for unkind language which would not qualify as libelous.

Not only do the common law requirements of the tort require a showing of severe emotional distress, but the First Amendment also requires such proof. As noted in section II, *supra*, public officials and public figures must be expected to endure a certain degree of caustic criticism. Mere hurt feelings are constitutionally insufficient to justify the imposition of substantial damages upon one who chooses to speak his mind, however unkindly, about a public personage.

CONCLUSION

If the Court of Appeals decision is permitted to stand, the law of libel and the First Amendment protections which have grown up around it will be fatally undermined. Defamation law will fall into disuse because it will be so much easier for a public figure to prove intentional infliction of emotional distress without having to prove that the defendant made a false statement of fact, or that the defendant spoke or published with knowing or reckless falsity.

It is not only the *Hustler* Magazines of this world which will be threatened if Respondent is allowed to prevail. As Judge Wilkinson noted, "To permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law since *New York Times v. Sullivan*." [App. B at B4.] If the Court of Appeals' holding remains the law, nobody will dare to speak with ill will toward a public figure. The self-censorship which the *New York Times v. Sullivan* actual malice rule was intended to prevent will stay the pen of every editorial cartoonist and columnist who considers writing about a public figure whom he or she dislikes. The decision below is a dangerous one in a society which values wide-open debate.

The decision of the Court of Appeals is bound to have a chilling effect upon the free exercise of First Amendment rights unless this Court grants this petition for a writ of certiorari and reverses the unconstitutional result below.

Respectfully submitted,

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February 2, 1987

APPENDIX A

PUBLISHED

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1417(L)

Reverend Jerry Falwell,

Appellee,

Versus

Larry C. Flynt;
Hustler Magazine, Inc.,

Appellants,

and

Flynt Distributing Company, Inc.

Defendant.

85-1480

Reverend Jerry Falwell,

Appellant,

Versus

Larry C. Flynt,
Hustler Magazine, Inc.;
Flynt Distributing Company, Inc.

Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke and Lynchburg. James C. Turk, District Judge. (C/A 83-0155-LR).

Argued: April 8, 1986 Decided: August 5, 1986

Before HALL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Alan L. Isaacman and David Carson (Cooper, Epstein & Hurewitz: Arthur P. Strickland; Strickland & Rogers on brief) for Appellants/cross-appellees; Norman Roy Grutman (Jewel H. Bjork; Jeffrey H. Daichman; Thomas V. Marino; Grutman, Miller, Greenspoon, Hendler & Levin on brief) for Appellee/cross-appellant.

CHAPMAN, Circuit Judge:

This lawsuit arises out of an "ad parody" that appeared in the November 1983 and March 1984 issues of *Hustler*, which is published by defendants Larry Flynt and Hustler Magazine, Inc. (Hustler), and is distributed by defendant Flynt Distributing Company (FDC). The subject of this parody was the Reverend Jerry Falwell, a well-known pastor and commentator on political issues. Falwell sued the defendants for libel, invasion of privacy, and intentional infliction of emotional distress. At the close of evidence, the district court dismissed Falwell's claim for invasion of privacy and sent the other two claims to the jury. The jury found against Flynt and Hustler on the emotional distress claim and against Falwell on the libel claim.

These defendants have appealed, and Falwell has filed a cross appeal. The issues before this court can be grouped into four categories: the constitutional issues, the common law tort issues related to intentional infliction of emotional distress, the evidentiary issues, and finally, Falwell's cross appeal, which claims that the district court erred in dismissing his claim for invasion of privacy.

I

The "ad parody" which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about their "first time." They mean, their first encounter with Campari Liqueur, but there is double entendre with a sexual connotation. In the *Hustler* parody, Falwell is the celebrity in the advertisement. It contains his photograph and the text

of an interview which is attributed to him. In this interview Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and Falwell appears as a hypocrite and habitual drunkard. At the bottom of the page is a disclaimer which states "ad parody — not to be taken seriously." The parody is listed in the table of contents as "Fiction; Ad and Personality Parody."

Falwell was first shown the ad parody by a reporter in the fall of 1983. Shortly thereafter, he filed suit against Flynt, Hustler and FDC in the United States District Court for the Western District of Virginia. Falwell alleged three theories of liability: libel, invasion of privacy under Va. Code § 8.01-40 (1984), and intentional infliction of emotional distress. Hustler then republished the parody in its March 1984 issue.

In June 1984, Falwell's counsel took Larry Flynt's deposition, which was recorded on video tape. During the deposition Flynt identified himself as Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh and testified that the parody was written by rock stars Yoko Ono and Billy Idol. It also contained the following colloquy concerning the parody:

Q. Did you want to upset Reverend Falwell?

A. Yes. . . .

Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar, too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.

[J.A. 901-902]

Trial began in December 1984. While the district court had initially granted the defendant's pretrial motion to suppress the deposition on the grounds that Flynt could not comprehend the obligation of the oath or give a correct account of events, the district court reversed itself on the first day of trial and permitted Falwell to introduce an edited version containing only those portions relevant to the instant lawsuit. The defendants then showed the jury the entire deposition, stating that the edited deposition was misleading. In spite of the defendants' strenuous objections, the

district court also permitted the introduction of the two *Hustler* issues containing the parody and excerpts from prior issues that had lampooned Falwell.

At the close of evidence, the district court dismissed Falwell's invasion of privacy claim brought under Va. Code 8.01- 40 (1984), which creates a cause of action for damages arising from the use of a person's name or likeness for purposes of trade or advertising without his consent. The district court ruled that although the parody used Falwell's name and likeness, the use was not for purposes of trade within the meaning of the statute.

The jury returned a verdict for the defendants on the libel claim, finding that no reasonable man would believe that the parody was describing actual facts about Falwell. On the emotional distress claim, the jury returned a verdict against Flynt and Hustler, but not F.D.C. The jury awarded $100,000 in actual damages, $50,000 in punitive damages against Flynt, and $50,000 in punitive damages against Hustler.

II

The defendants make two constitutional arguments. First, they assert that since Falwell is admittedly a public figure the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) must be met before Falwell can recover for emotional distress. They argue that the actual malice standard has not been met. Second, the defendants contend that since the jury found that the parody was not reasonably believable,[1]

[1] Defendants argue that the more vile and outrageous the statement about a public figure, the greater the protection to the publisher because the public is not apt to believe such a statement.

the statements contained therein cannot be statements of fact but must be opinion and are, therefore, completely shielded by the first amendment.

The defendants maintain initially that since Falwell is a public figure, they are entitled to the same level of first amendment protection in an action for intentional infliction of emotional distress that they would receive in an action for libel. We agree. Once an action for libel was a plaintiff's sole remedy for a defamatory publication in a news medium. The last century has, however, seen the acceptance of the new emotional distress and invasion of privacy torts which may arise from the same underlying facts. Thus, while a tortious publication once gave rise only to an action for libel, it may now support the additional claims. There has been, of late, a growing trend toward pleading libel, invasion of privacy and intentional infliction of emotional distress in lawsuits arising from a tortious publication. Mead, *Suing the Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Wash. L.J. 24 (1983). The instant case typifies this trend; Falwell asserted all three theories of liability.

In *New York Times*, the Supreme Court determined that libel actions brought by public officials against the press can have a chilling effect on the press inconsistent with the first amendment. Therefore, when a public official sues for libel based upon a tortious publication, the defendant is entitled to a degree of first amendment protection. This protection has been extended to cases in which the plaintiff is a public figure, *Curtis Publishing Company v. Butts*, 388 U.S. 130

(1967) and to actions of invasion of privacy for casting the plaintiff in a false light, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), but not to cases in which the plaintiff is a private figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It is not the theory of liability advanced, but the status of the plaintiff, as a public figure or official and the gravamen of a tortious publication which give rise to the first amendment protection prescribed by *New York Times*.

In the case at bar, Falwell is a public figure, and the gravamen of the suit is a tortious publication. The defendants are, therefore, entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel. To hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which it sought to abolish.

The issue then becomes what form first amendment protection should take in an action for intentional infliction of emotional distress. The defendants argue that Falwell must prove that the parody was published with knowing falsity or reckless disregard for the truth. This is the actual malice standard of *New York Times v. Sullivan*.[2] While we agree that the same level of protection is due the defendants, we do not believe that the literal application of the actual malice standard

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[2] "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

376 U.S. at 279-280.

which they seek is appropriate in an action for intentional infliction of emotional distress.

The actual malice standard originated as a remedy for the first amendment problem that arises under common law defamation. Historically, the individual's interest in a good reputation has been regarded as so significant that the law has held one who intentionally published defamatory material to a standard of strict liability. But recognizing that people in a free society must have ready access to information and ideas if that society is to endure, the established common law attempted to reconcile these divergent interests by holding a publisher strictly liable for his publication unless he could prove that the publication was either true or subject to a conditional privilege. There was no privilege for a good faith mistake of fact. *Owens v. Scott Publishing*, 46 Wash. 2d 666, 284 P.2d 296 (1955), *cert. denied* 350 U.S. 968 (1956); *Peck v. Tribune Company*, 214 U.S. 185 (1909).

The Supreme Court changed the law in *New York Times v. Sullivan*. The Court held that defendants could be held liable for defamation of public officials only if the defamatory falsehood was published with actual malice.[3] The effect of *New York Times* and its progeny is to increase the level of fault necessary for a public figure to prevail in an action for defamation. Where the defendant was once held strictly liable for a false publication, he is now held liable only for his knowing

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[3] Actual malice under *New York Times* is different from common law malice, which is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. *New York Times'* actual malice might be better understood if designated as "constitutional malice" or "publication malice."

or reckless misconduct. *New York Times* gives the press protection from honest mistakes, but it is not a license to lie.

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature.[4] The defendants argue that *New York Times* dictates such a result. But their argument emphasizes the language "falsity or . . . disregard for the truth," and thus misreads *New York Times*. Properly read, *New*

---

[4] In Virginia, the essential elements to be proved in an action for intentional infliction of emotional distress are that the wrongdoer's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with plaintiff's emotional distress; and (4) caused emotional distress that was severe. *Womack v. Eldridge*, 215 Va. 338, 210 S.E. 2d 145, 148 (1974).

York Times focuses on culpability. The emphasis of the actual malice standard is "knowing . . . or reckless."

The first of the four elements of intentional infliction of emotional distress under Virginia law requires that the defendant's misconduct be intentional or reckless. This is precisely the level of fault that *New York Times* requires in an action for defamation. The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress. We, therefore, hold that when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of. The jury made such a finding here, and thus the constitutional standard is satisfied.

The defendants also argue that since the jury found that a reader could not reasonably believe that the parody was describing actual facts about Falwell, it must be an opinion and therefore is protected by the first amendment. At common law the dichotomy between statements of fact and opinion was often dispositive in actions for defamation. An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se. We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress. The defendants' argument on this point is, therefore, irrelevant in the context of this tort.

III

The defendants argue that since Falwell was unable to recover for libel, he cannot recover for emotional distress. It is the defendant's theory that emotional distress is intended to provide tort remedies to plaintiffs who have none, but that intentional infliction of emotional distress is not available when the conduct complained of fails well within the ambit of other traditional tort liability. While there is some support for the defendant's position in at least one jurisdiction, *see Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978), we believe the law of Virginia to be otherwise. *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985). The elements of libel and intentional infliction of emotional distress are different and the facts in the instant case will independently support the latter tort. We are convinced, therefore, that Falwell's failure to recover for libel does not, as a matter of law, prevent him from recovering for intentional infliction of emotional distress. *C.f. Chuy v. Philadelphia Eagle Football Club*, 595 F.2d 1265 (3rd Cir. 1979) (*en banc*).

The defendants also argue that Falwell presented insufficient evidence to sustain any of the elements of intentional infliction of emotional distress. We may reverse a jury verdict only when there is a complete absence of facts to support the conclusions reached by the jury. *Sherril White Construction, Inc. v. South Carolina National Bank*, 713 F.2d 1047 (4th Cir. 1983). The four elements which must be shown in order to recover for intentional infliction of emotional distress in Virginia have been set forth in footnote 4.

In his deposition Flynt testified that he intended to cause Falwell emotional distress. If the jury found his

testimony on this point to be credible, then it could have found that Falwell satisfied the first element. Evidence of the second element, outrageousness, is quite obvious from the language in the parody and in the fact that Flynt republished the parody after this lawsuit was filed. The final elements require the plaintiff to prove that the defendant's conduct proximately caused severe emotional distress. At trial, when Falwell was asked about his reaction to the parody, he testified as follows:

> A. I think I have never been as angry as I was at that moment. . . . My anger became a more rational and deep hurt. I somehow felt that in all of my life I had never believed that human beings could do something like this. I really felt like weeping. I am not a deeply emotional person; I don't show it. I think I felt like weeping.
>
> Q. How long did this sense of anger last?
>
> A. To this present moment.
>
> Q. You say that it almost brought you to tears. In your whole life, Mr. Falwell, had you ever had a personal experience of such intensity that could compare with the feeling that you had when you saw this ad?
>
> A. Never had. Since I have been a Christian I don't think I have ever intentionally hurt anybody. I am sure I have hurt people but not with intent. I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.

A colleague of Falwell's, Dr. Ron Godwin, testified that Falwell's enthusiasm and optimism visibly

suffered as a result of this parody. Godwin also stated that Falwell's ability to concentrate on the myriad details of running his extensive ministry was diminished. This testimony would enable a jury to find that Falwell's distress was severe and that it was proximately caused by defendant's publication of the parody. We find, therefore, that the evidence is sufficient to sustain the jury's verdict against the defendants for intentional infliction of emotional distress.

IV

The defendants appeal several evidentiary rulings made by the district court during the course of trial. The primary issue involves the district court's decision to admit Flynt's videotaped deposition. The defendants argue that Flynt was mentally incapable[5] of telling the truth at the time he was deposed. At common law a charge of mental incapacity could be used to challenge a witness' competency to testify, but under the Federal Rules of Evidence this objection excludes testimony only in the rare case in which the judge finds that because of the witness' infirmities, the proffered testimony fails to meet the relevancy requirements of Rules 104(b), 401 and 403. Consequently, in cases in which lawyers would have once argued to the judge that a witness should not be heard, they now argue to the jury that the witness should not be believed. J. Weinstein & M. Berger, 3 *Weinstein's Evidence*, § 607[04] (1985). The Notes of Advisory Committee

[5] He had recently suffered a broken leg and was on medication.

on Proposed Rules for Rule 601 offer the following instruction:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. (Citations omitted)

We agree with these authorities. The relevant question posed by Flynt's deposition testimony was not one of competency but rather of credibility. The district court did not abuse its discretion in admitting that evidence.

The defendants argue that the district court erred in admitting derogatory statements about Falwell that had been published in prior issues of *Hustler*. The defendants admit that these statements might be indicative of hatred or ill will toward Falwell, but they argue such evidence is not relevant to the actual malice inquiry necessitated by Falwell's libel claim. It is, however, well established that the jury may infer from the totality of the defendant's conduct toward a plaintiff "a predetermined and preconceived plan to malign [plaintiff's] character" and cause him injury which is, of course, a functional definition of actual malice. *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied* 396 U.S. 1094 (1970). This evidence was properly admitted.

The defendants also objected to the introduction of those issues of *Hustler* in which the parody had appeared. They maintained that the magazines were irrelevant in the first place and more prejudicial than probative in the second place. The context in which the parody was published is relevant to Falwell's libel claim on the issue of the credibility of the statements made about Falwell and on the issue of damages. The defendants' objection that these magazines were more prejudicial than probative must also fail, since it was necessary for the jury to see the parody in context in order to decide these issues. *See Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985).

V

At the close of evidence, the district court dismissed Falwell's action for invasion of privacy pursuant to Va. Code § 8.01-40 (1985) on the grounds that the ad parody which appeared in Hustler did not constitute a use of Falwell's name and likeness "for purposes of trade" within the meaning of the statute. Falwell has filed a cross appeal alleging that the district court erred in this ruling. We disagree.

The Virginia statute reads, in pertinent part:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person ... for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover

> damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

There are no decisions of the Virginia courts which construe this statute. This statute is, however, substantially similar to § 51 of the New York Civil Rights Law. This court has looked to the New York courts for guidance in construing the Virginia privacy statute. *Brown v. American Broadcasting Co.*, 704 F.2d 1296 (4th Cir. 1983).

In order to further the legitimate dissemination of news and information, the New York courts have routinely held that use of a public figure's name or likeness cannot constitute a use for purposes of trade. *See Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N.Y.S. 752 (1st Dep't 1919) and *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952). There is an exception to this general rule which holds that if the use of a public figure's name or likeness is infected with substantial and material falsification, and if it is published with knowledge of such falsification or with reckless disregard for the truth, then it is a use for purposes of trade and the public figure can recover. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed* 393 U.S. 1046 (1969). This exception has been further refined in the case of *Hicks v. Casablanca Records*, 464 F.Supp. 426 (S.D.N.Y. 1978) in which the court held that in addition to containing substantial and material falsification, the use of the public figure's name or likeness must take such a form that the reader would

reasonably believe the falsification. Thus, in *Spahn* where the use took the form of biography, there was a use for purposes of trade, but in *Hicks* where the use took the form of a novel, there was no use for purposes of trade.

Because the jury found that the parody in the instant case was not reasonably believable and because it contained a disclaimer, publication of the parody did not constitute a use of Falwell's name and likeness for purposes of trade. The district court properly dismissed this claim. For these reasons, the decision of the district court is affirmed.

AFFIRMED.

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APPENDIX B

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1417(L)

Reverend Jerry Falwell,

Appellee,

versus

Larry C. Flynt;
Hustler Magazine, Inc.,

Appellants,

and

Flynt Distributing Company, Inc.

Defendant.

85-1480

Reverend Jerry Falwell,

Appellant,

versus

Larry C. Flynt; Hustler Magazine, Inc.; Flynt Distributing Company, Inc.,

Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

CORRECTED ORDER/UNPUBLISHED TO PUBLISHED

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Winter, Phillips, Sprouse, Ervin and Wilkinson voted to rehear the case in banc; and Judges Russell, Widener, Hall, Murnaghan, Wilkins and Chapman voted against rehearing the case in banc. As a majority of the Judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Hall and Judge Butzner.

For the Court,

John M. Greacen
CLERK

Dated: November 4, 1986

WILKINSON, Circuit Judge, with whom PHILLIPS, SPROUSE, and ERVIN, Circuit Judges, join, dissenting from the denial of rehearing *en banc*:

I share with the court a profound repugnance for the communication in this case. For all the controversy that surrounds the Reverend Falwell, the communication was an utterly unwarranted and offensive personal attack. Moreover, *Hustler* magazine, which leveled that attack, is a singularly unappealing beneficiary of First Amendment values and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate.

The jury verdict below, however, raises serious questions under the First Amendment which this court should consider *en banc*. Foremost among them is whether those in political life should ever be able to recover damages for no other reason than hurt feelings or, to use the terminology of tort law, because critical commentary inflicted upon them a degree of emotional distress. To permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law of defamation since *New York Times v. Sullivan*, 376 U.S. 254 (1964). It surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate.

Participants in public life are not powerless against attacks upon their reputations. They may bring an action in libel to protect against the false infliction of reputational harm. "Damage to reputation is, of course,, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). *Reputational* harm and *emotional* harm are, however, very different things. No one, upon entering political life, should be expected to

suffer malicious damage to his or her reputation. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). But one does expect to endure emotional slights. There are, inescapably, emotional scars that accompany political participation. Indeed, if the electorate is to make informed choices, the political atmosphere will crackle with derision and approbation alike.

The Supreme Court has long sought to strike the balance between "vigorous debate on the public issues . . . while at the same time affording protection to the reputation of individuls." *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 (1978). To preserve the climate for free political debate, the Court has let persons speak their minds on public officials without inordinate fear of liability in tort. It has imposed one limitation on this broad freedom: public officials may sue in libel for defamatory falsehoods made either with knowledge of their falsity or with reckless disregard of truth. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

The panel opinion now adds another limitation: a separate cause of action for political figures for speech that causes emotional distress. Private persons may recover for speech that causes such harm. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). And damages for mental anguish may be available to a public official *after* he has proved a defamatory falsehood. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). It may be too that some public figures, professional athletes for example, may recover for the infliction of emotional harm through the press. *Chuy v. Philadelphia Eagles*, 595 F.2d 1265 (3rd Cir. 1979) (*en banc*).

But the Reverend Falwell is simply not that kind of public figure. It is true that he does not hold an office or cast a vote. Yet he is as integral a part of political

life as those who do. Although the Supreme Court has recognized a difference between public officials and those public figures who owe their fame to nonpolitical achievements, that distinction is unpersuasive in this case. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967); *Monitor Patriot Co. v. Roy*, 401 U.S. at 271. The Reverend Falwell is at the forefront of major policy debates; he enjoys the most intimate access to the highest circles of power; he possesses a forum for presenting his views and establishing his character; he has sought and relished the give-and-take of political combat. This category of public figure, as much as any public official, will draw "the vehement, caustic, and sometimes unpleasantly sharp attacks" that create emotional distress. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. 1558, 1561 (1986).

Because he stands on the same footing as a public official, Rev. Falwell was entitled to protect his reputation by bringing a libel suit and showing a false statement made with actual malice. Falwell did bring a libel suit, but he lost. The jury found in a special verdict that no one could reasonably have believed that the communication was presenting actual facts about anyone's personal life. Reputational damage to the Reverend Falwell was nil. Having failed to persuade the jury on the libel count, Falwell cannot then recover for emotional harm in the absence of reputational damage, for the constitutional principles of freedom of expression preclude attaching adverse consequences to utterances other than defamatory falsehoods. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964); *Greenbelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 5, 10 (1970).

An additional action for emotional distress does not belong in the hands of political figures. The tort began

in a case where a woman suffered serious and permanent injuries after a practical "joker" told her to get two pillows to fetch her husband home because he was smashed up in an accident and had two broken legs. *Wilkinson v. Downtown* [1897] 2 Q.B.D. 57. In 1971, Dean Prosser was still able to write that "though the law appears to be moving in the direction of liability . . . recovery is still limited to the most extreme cases of violent attack, where there is some especial likelihood of fright or shock, usually on the part of a woman." Prosser, *Law of Torts* (4th Ed. 1971). Though the tort of emotional distress has taken on new life in recent years, its extension to this case — to the very persons whose calling requires emotional strength and resiliency — is unwarranted. Indeed, to place the tort in the hands of political figures is to reject the rough-and-tumble that defines political life. In the political arena, "a certain toughness of the mental hide is a better protection than the law could ever be." Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 Harv. L.Rev. 1033, 1035 (1936).

II.

The jury in this case obviously did not believe that the communication was or purported to be a true disclosure about a public figure's personal life. Its verdict on the libel count demonstrates that the jury took this communication for what it was, namely a tasteless, silly, and scurrilous bit of nonsense. The panel opinion allows recovery because that communication strayed beyond the bounds of common decency. And, if decency were the only issue on appeal, there would be no disagreement.

The Supreme Court, however, has long recognized that "the most repulsive speech enjoys immunity" provided it does not violate those standards set forth in *New York Times* and its progeny. *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1965)). The protections of the First Amendment do not turn upon the popularity or acceptability of that which is asserted. *New York Times*, 376 U.S. at 271. Rather, our Constitution protects "even those opinions that we loathe and believe to be fraught with death." *Roy*, 401 U.S. at 275 (quoting *Abrams v. U.S.*, 250 U.S. 616, 630 (Holmes, J., dissenting)). In *Roy*, the Court emphasized that offensive speech may extend even to the personal attributes of political figures, especially those who offer themselves as moral examples:

> The principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary. Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."

Monitor Patriot Co. v. Roy, 401 U.S. at 274 (footnote omitted).

This does not suggest, however, that critics of public officials have *carte blanche*. Nor may they resort with impunity to the fig-leaf of an "Ad Parody — Not to be Taken Seriously." That label was applied to the *Hustler* "ad" in this case, and it did not and should not convey upon Flynt some magical immunity from suit. For example, if the communication were obscene, the parodist could certainly be prosecuted under the obscenity laws. *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982). If the communication were found to be a false infliction of reputational harm, the publisher would be subject to a libel judgment. But one simply cannot subject a parody of a political figure to a cause of action for emotional distress.

The reason for this is obvious. Political satire and parody *aim* to distress. This genre of commentary depends upon distortion and discomfiture for its effect. The best political humor may be in bad taste. The cartoonists's nightmare may be that the intended victim of all his insult and ridicule indeed *fails* to suffer emotional distress, but instead finds the whole thing merely funny and calls up the cartoonist, not to complain, but to ask for the original. *See* Barnes, *Lovenbombing*, The New Republic, October 13, 1986 at 12.

III.

Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire

is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air. While *Hustler's* base parody is unworthy of this or any tradition, the precedent created by the cause of action against this defendant may one day come to stifle the finer forms of this genre.

The natural urge to bring down self-appointed moralists led Moliere to satirize the French lay clergy in *Tartuffe*, and motivated Mencken to chastise novelists for failing to look beneath the surface of American evangelists. Sinclair Lewis acted on Mencken's suggestion by writing *Elmer Gantry*, a scathing satiric attack on the Protestant clergy and the public's willingness to boost demagogues to positions of influence. E. Martin, *H. L. Mencken and the Debunkers* 123 (1984).

Public moralists have not been the only victims of the satirist's wit. Despite his enormous popularity in 1879, George Washington was once depicted on a donkey led by his aide David Humphreys over the caption, "The glorious time has come to pass/When David shall conduct an ass." S. Hess and M. Kaplan, *The Ungentlemanly Art: A History of American Political Cartoons* 61 (1968). Thomas Jefferson was forced to endure vicious rumors spread by general gossip as well as by his political enemies. For example, he was drawn as a lecherous beast who waited in his shirttails outside his wife's bedroom and as the keeper of a slave harem who auctioned his mulatto offspring into slavery. *See* V. Dabney, *The Jefferson Scandals: A Rebuttal* 9-15 (1981). Similarly, political cartoonists have portrayed

Grover Cleveland as the father of an illegitimate child, pictured James Garfield as an unwed mother in a dress, and lambasted Ulysses S. Grant as an incompetent drunkard. *See generally*, Hess and Kaplan, *supra:* W. Murrell, *A History of American Graphic Humor* (1967).

William Charles, America's first widely acclaimed political cartoonist, found it expedient to leave Scotland in 1806 after he published an irreverent cartoon. The cartoon, "A Fallen Pillar of the Kirk," showed a clergyman bouncing a bare-bosomed young woman on his knee while exclaiming, "Oh Lord, what good things dost thou provide for us men!" Murrell, at 80. More recently, Gary Trudeau's *Doonesbury* has satirized the sanctuary movement of the liberation theologians and the Rev. Pat Robertson's direct line to divine inspiration.

These few examples ilustrate the tradition of satiric comment. Much of the comment went overboard, and much would be considered libelous today. For all its clatter and hubbub, however, it has not undermined this country's profound respect for presidents and priests. But it has enhanced political debate. Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed. An observant electorate may also gain by watching the reactions of objects of satiric comment, noting those who take themselves seriously and those whose self- perspective is somewhat more relaxed.

IV.

The First Amendment relies on unfettered commerce in speech to regulate criticism of political

figures. No matter how pernicious an opinion, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (quoting *Gertz*, 418 U.S. at 339-40). As Judge Learned Hand noted, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (quoted in *New York Times*, 376 U.S. at 252-53). The panel's recognition of the tort of emotional distress now threatens to disrupt our historic reliance on this marketplace to regulate political speech.

A limited amount of regulation by law is allowed because the market cannot effectively regulate some forms of speech. *New York Times* recognized libelous statements made with actual malice as a permissible exception to the rule of the marketplace. The reason for this market exception is that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advance society's interest in 'uninhibited, robust, and wide-open' debate." *Gertz*, 418 U.S. at 340. Libelous statements not only fail to advance a societal interest; they actually impair the efficiency of the marketplace. If individuals could freely publish knowing or reckless falsehoods injurious to reputations, the market would be forced to view all factual statements with increased suspicion, a suspicion that would seriously impede the give-and-take of political discourse.

This rationale collapses with the tort of emotional distress. Here the market provides an efficient and effective way to dispatch outlandish comments which the First Amendment prefers to a regime of legal regulation. Speech such as the *Hustler* publication serves in the market only to discredit the speaker. It does not persuade, and it detracts not one whit from Rev. Falwell's reputation. Vicious and gratuitously personal attacks may well attract support and sympathy for their targets. Indeed, in this connection, the Ninth Circuit has ruled recently that Falwell's own distribution of the copyrighted *Hustler* ad for fund raising purposes was "fair use." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 55 U.S.L.W. 2151 (9th Cir., Aug. 12, 1986).

The tort of emotional distress is more than just unnecessary to regulate political discourse; it will prove a profound and ominous inhibitor of speech. To recover under the tort, a political figure need show only the defendant's intention to publish something he should have known would cause emotional distress; conduct that offended the generally accepted standards of decency and morality; severe emotional distress; and a causal connection between the defendant's act and the emotional distress. *Womack v. Eldrige*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). These elements encompass an absolutely staggering array of political statements, and there is no limiting principle in the panel opinion.

First and most importantly, the tort allows a political figure to recover for a perfectly true statement. This element strikes at the very heart of the First Amendment because, at a bare minimum, the Amendment must protect true speech about political

figures. The Supreme Court has recently held that, if a statement deals with a matter of public concern, even a private figure cannot recover in a libel suit without showing its falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S.Ct. at 1559. If we now allow public figures to recover for true statements because of wounded sensibilities, we have entered a brave new world of First Amendment jurisprudence.

Second, the tort holds a defendant liable because he intended to cause emotional harm to a political figure. The Supreme Court has repeatedly stated that a defendant cannot be liable merely because he intended his statement to inflict harm. *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Garrison*, 379 U.S. at 73; *New York Times*, 367 U.S. at 279-80. In a libel case, "instructions which permit a jury to impose liability on the basis of a defendant's hatred, spite, or ill will, or desire to injure are 'clearly impermissible.' " *Letter Carriers*, 418 U.S. at 281. Moreover, the Court has noted that, when a publisher criticizes a popular political figure, "it may be almost impossible to show freedom from ill will." *Garrison*, 379 U.S. at 74. By conditioning liability on a simple showing of intent, the panel jettisons a wealth of First Amendment precedent.

Third, a plaintiff can so easily show that a defendant intended to publish the communication and that it caused emotional distress that liability under this tort becomes a matter of whether the communication offended generally accepted standards of decency and morality. This standard gives the jury almost unlimited discretion — more, for example, than the Supreme Court has permitted in the area of obscenity. *Miller*, 413 U.S. at 24. If the First Amendment protects only

speech a jury finds to be generally acceptable, it serves no purpose. No one is sued for expressing pleasing sentiments. Either the First Amendment protects speech that makes someone uncomfortable, or it protects nothing. If the Amendment is to retain its full vitality, it cannot permit a public figure in the political arena to recover for emotionally upsetting speech.

V.

Any panel holding with implications this far-reaching deserves the attention of the court *en banc*. The Supreme Court has made clear that recovery for political figures should be limited to the malicious infliction of defamatory falsehood. The possibility that controversial political figures could run to court and recover for emotional distress, when a jury has found no false statement of fact, no libel, and no reputational damage, undermines the First Amendment and its core purpose of protecting political debate. George Washington may have felt a lot worse — felt a lot more pure emotional distress — from Freneau's viciousness than his plaintiff here.* But what a tragedy it would have been had he choked things off at the foundation by winning a lawsuit for emotional distress.

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*Philip Freneau (1752-1832) earned the name of "poet of the American Revolution" by satirizing the British and Loyalists, and by commemorating the deeds of the American patriots. Not all of his barbs were aimed at the British, however. Washington was so aggravated by "that rascal Freneau" that he wished Secretary of State Jefferson to remove Freneau from his State Department position. Jefferson declined. Freneau was compelled to resign, however, after Jefferson's retirement. L. Leary, *That Rascal Freneau*, 233-36 (1941).

WINTER, Chief Judge, dissenting from the denial of rehearing in banc:

Because my participation in the case has not exposed me to the full adversarial process, I am not presently disposed to express any view on the correctness of the panel decision. But the eloquent dissent of Judge Wilkinson overwhelmingly demonstrates that this is a classic case for in banc consideration. It is a case involving the most fundamental freedom in a context of the greatest significance on which there is a dearth of authority. Why, when the court has freely granted rehearings in banc in recent years in many less significant cases, it declines to do so here, is inexplicable.

I, too, dissent from the denial of rehearing in banc.



APPENDIX C

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APPENDIX C

IN THE UNITED STATES
DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

REVEREND JERRY FALWELL,	)	Civil Action No. 83-0155-L-R
Plaintiff,	)	
v.	)	
LARRY C. FLYNT, HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,	)	FINAL JUDGMENT AND ORDER
Defendants	)	

This case was tried before a jury on December 3-8, 1985, and the jury returned a special verdict as follows:

(1) Do you find from a preponderance of the evidence in this case that the article published in the November 1983 and the March 1984 issues of Hustler Magazine (page 2 of plaintiff's exhibit #1 and page 20 of plaintiff's exhibit #3) could reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated?

Yes _____ NO No

If your answer to question 1 is "yes", go to question 2. If your answer to question 1 is "no", go to question 3.

(2)(a) Do you find by clear and convincing evidence that the defendant, Larry C. Flynt, acted with actual malice in the publication of the article in question?

Yes _____ No _____

(b) Do you find by clear and convincing evidence that the defendant Hustler Magazine, Inc. or anyone acting on behalf of Hustler Magazine, Inc. acted with actual malice in the publication of the article in question?

Yes _____ No _____

(c) Do you find by clear and convincing evidence that the defendant Flynt Distributing Company, Inc. or anyone acting on behalf of Flynt Distributing Company, Inc. acted with actual malice in the publication of the article in question?

Yes _____ No _____

(3)(a) Do you find by a preponderance of the evidence that the defendant Larry C. Flynt conducted himself in such a manner in connection with the article in question as to intentionally inflict emotional distress upon the plaintiff?

Yes YES No _____

(b) Do you find by a preponderance of the evidence that the defendant Hustler Magazine, Inc., or anyone acting on behalf of Hustler Magazine, Inc. conducted himself in such a manner in connection with the article in question as to intentionally inflict emotional distress upon the plaintiff?

Yes YES No _____

(c) Do you find by a preponderance of the evidence that the defendant Flynt Distributing Company, Inc. or anyone acting on behalf of Flynt Distributing Company, Inc. conducted himself in such a manner in connection with the article in question as to intentionally inflict emotional distress upon the plaintiff?

Yes _____ No NO

(4) If your answer to questions 2 and/or 3 is "yes", state the amount of compensatory damages, if any, to which plaintiff is entitled.

$ 100,000.00

(5)(a) Do you find that punitive damages should be assessed against any one or more of the defendants in this case?

Yes YES No _____

(b) If you have answered question 5(a) "Yes", indicate the defendant or defendants

against whom punitive damages should be assessed:

Larry C. Flynt

YES (Yes) ____ (No)

Hustler Magazine, Inc.

YES (Yes) ____ (No)

Flynt Distributing Company, Inc.

____ (Yes) NO (No)

12-8-84 William E. Anderson, Sr. (FOREMAN)

On the issue of punitive damages, the jury returned a second special verdict form as follows:

We, the jury, assess punitive damages as against Larry C. Flynt in the amount of $ 50,000.00

We, the jury, assess punitive damages as against Hustler Magazine, Inc. in the amount of $ 50,000.00

12-8-84 (Date) William E. Anderson, Sr. (FOREMAN)

The verdict was filed and the parties were given time in which to file post-trial motions.

Two of the defendants, Larry C. Flynt and Hustler Magazine, Inc., filed a motion for judgment notwithstanding the verdict. Defendant Flynt Distributing Company, Inc., having been absolved of all liability by the jury, was not a party to this motion. In accordance with the memorandum opinion filed this date, it is hereby

ADJUDGED AND ORDERED

(1) That judgment shall be and hereby is entered in favor of Defendant Flynt Distributing Company, Inc., and Plaintiff shall recover nothing from Defendant Flynt Distributing Company, Inc., in accordance with the verdict returned by the jury;

(2) That the Motion for Judgment Notwithstanding the Verdict filed on behalf of Hustler Magazine, Inc. shall be and hereby is DENIED;

(3) That the Motion for Judgment Notwithstanding the Verdict filed on behalf of Larry C. Flynt individually shall be and hereby is DENIED;

(4) That the Plaintiff, Reverend Jerry Falwell, shall recover One Hundred Thousand Dollars ($100,000.00) in compensatory damages from the defendants Hustler Magazine, Inc. and Larry C. Flynt, with interest thereon at the legal rate from December 8, 1984 until paid. The liability for compensatory damages shall be joint and several;

(5) That the Plaintiff, Reverend Jerry Falwell, shall recover Fifty Thousand Dollars ($50,000.00) in punitive damages from defendant Hustler Magazine, Inc. and Fifty Thousand Dollars ($50,000.00) in punitive damages from defendant Larry C. Flynt, with interest thereon at the legal rate from December 8, 1984 until paid;

(6) That the Defendant, Flynt Distributing Company, Inc., shall recover its taxable costs from Plaintiff; and Plaintiff shall recover his taxable costs from the Defendants, Hustler Magazine, Inc. and Larry C. Flynt.

The Clerk of Court is directed to strike this case from the court's active docket and to send certified copies of this final judgment and order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 19th day of April, 1985.

James C. Cacheris

Chief United States District Judge

APPENDIX D

FILED
APR 19 1985
JOYCE F. WITT, Clerk
By:
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

REVEREND JERRY FALWELL,	)	Civil Action No. 83-0155-L-R
Plaintiff,	)	
v.	)	
LARRY C. FLYNT, HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,	)	MEMORANDUM OPINION By: James C. Turk, Chief U.S. District Judge
Defendants	)	

Plaintiff Jerry Falwell brought this diversity action seeking recovery for invasion of privacy, libel, and intentional infliction of emotional distress. Impetus for the suit was an ad parody appearing in the November 1983 and March 1984 issues of *Hustler* magazine. Parodying a familiar series of ads for Campari liqueur, the fake ad featured a fictitious interview with plaintiff and depicted him as a hypocritical, incestuous drunkard. A photograph of plaintiff accompanied the text. The ad parody also carried a small disclaimer reading, "AD PARODY — NOT TO BE TAKEN SERIOUSLY."

Plaintiff is a fundamentalist preacher whose evangelistic ministry is centered in Lynchburg, Virginia. Defendants are all citizens of California. At all times pertinent to this action, defendant Larry C. Flynt was editor and publisher of *Hustler*; Hustler Magazine, Inc. (HMI), the magazine's corporate publisher; and Flynt Distributing Company, Inc. (FDC), its national distributor.

A jury heard the case from December 3, to December 8, 1984. After directing a verdict for the defendants on the invasion of privacy claim,[1] the court submitted to the jury plaintiff's remaining claims. In a special verdict, the jury denied plaintiff recovery on his libel claim, finding instead that the ad parody could not have been "reasonably . . . understood as describing actual facts about plaintiff or actual events in which plaintiff participated."

The verdict favored plaintiff, however, on his claim against Flynt and HMI for intentional infliction of emotional distress. Plaintiff was awarded $100,000 in compensatory damages, for which the defendants are jointly and severally liable, and punitive damages of $50,000 each. Absolved of any liability, FDC is not a party to the instant motions by Flynt and HMI for a judgment notwithstanding the verdict against them. It is on these motions that the case is now before the court.

---

[1] The Virginia privacy statute, Va. Code § 8.01-40 (1984), affords relief only upon a showing, among other things, that plaintiff's name or likeness was used for advertising or trade purposes. *See Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1210 (W.D. Va. 1981). Because plaintiff failed to make out a prima facie case under the statute, a directed verdict was appropriate.

Only with great reluctance should the court grant motions such as these. Considering a motion for judgment notwithstanding the verdict, the court asks only "whether the evidence was sufficient to permit a jury rationally to find" as it did. *Miller v. Premier Corp.*, 608 F.2d 973, 981 (4th Cir. 1979). A plaintiff alleging intentional infliction of emotional distress must, therefore, present evidence from which a jury could rationally conclude that he suffered severe emotional distress as a proximate result of defendant's intentional or reckless conduct, and that the conduct was both outrageous and intolerable. *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). For purposes of ruling on the motions at hand, the court will treat each of the moving defendants separately.

A. Larry Flynt

Defendant Flynt correctly states that, for plaintiff to recover on his claim of intentional infliction of emotional distress, he must first show that Flynt "had the specific purpose of inflicting emotional distress or [that] he intended his specific conduct and knew or should have known that emotional distress would likely result." *Id.* This specific purpose is abundantly clear from Flynt's own deposition.

> Q. Did you want to upset Reverend Falwell?
>
> A. Yes.

Flynt Deposition at 149.

> Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that

Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar, too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time that you wrote "okay," or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.

Id. at 155-56. Not only does he concede his desire to inflict mental suffering on plaintiff, but he also acknowledges that such harm "will cause pain that is as great [as] or greater than physical suffering." *Id.* at 169. Rare indeed is the case where an individual defendant so readily admits his own culpable intent. With such evidence before it, the jury certainly could

reasonably conclude that Flynt bore the requisite tortious intent toward plaintiff.

To be actionable, defendant's conduct must have been "outrageous and intolerable in that it offend[ed] against the generally accepted standards of decency and morality." *Womack*, 215 Va. at 342, 210 S.E.2d at 148. Whether the conduct at issue could reasonably permit recovery under this test is for the court to determine. If, in the court's estimation, reasonable men could differ, it is then for the jury to decide whether the particular conduct is so outrageous as to warrant liability. *Id.* (quoting Restatement (Second) of Torts § 46 comment h (1977)). Flynt's personal attack took the form of a graphic mischaracterization of plaintiff's relationship with his own mother and of his personal moral practices. The question of outrageousness in this case was properly before the jury, since reasonable men could disagree about the offensiveness of Flynt's conduct.

Whether plaintiff did, in fact, suffer severe emotional distress is the final consideration. *Womack*, 215 Va. at 342, 210 S.E.2d at 148. He testified on that point:

Q. Would you tell His Honor and the members of this jury what your personal reaction was when you read this ad in [the November 1983 issue of *Hustler*] over for the first time?

A. I think I have never been as angry as I was at that moment. . . .

. . . My anger became a more rational and deep hurt. I somehow felt that in all of my life I had never believed that human beings could do something like this. I really felt like

weeping. I am not a deeply emotional person; I don't show it. I think I felt like weeping.

Q. How long did this sense of anger last?

A. To this present moment.

Falwell Testimony at 36.

Q. You say that it almost brought you to tears. In your whole life, Mr. Falwell, had you ever had a personal experience of such intensity that could compare with the feeling that you had when you saw this ad?

A. Never had. Since I have been a Christian I don't think I have ever intentionally hurt anybody. I am sure I have hurt people but not with intent. I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.

Id. at 37. Plaintiff's colleague Dr. Ron Godwin offered coorborative testimony that "Dr. Falwell is a very enthusiastic, optimistic individual. . . . A certain degree of that enthusiasm and optimism, ability to concentrate, to focus on the myriad details of organizations such as ours, in my opinion, was diminished." Godwin Testimony at 24. As Executive Vice-President of Moral Majority, Godwin worked daily with plaintiff, the organization's president. It is the jury's task alone to determine the credibility of the witnesses and to weigh their testimony accordingly. The testimony of the two men gave the jury a sufficient basis on which to find reasonably that plaintiff's emotional distress was severe.

The parties agree that recovery for intentional infliction of emotional distress depends, finally, on plaintiff's showing a proximate causal connection

between defendant's tortious conduct and the alleged emotional distress. *Womack*, 215 Va. at 342, 210 S.E.2d at 148. According to plaintiff's testimony, his distress arose with his first reading of the ad parody. Falwell Testimony at 36, 62. The causal link between Flynt's conduct and plaintiff's resulting injury was thus the printing of the parody in *Hustler*. The evidence presented at trial was such that, if plaintiff suffered emotional injury, the jury could have reasonably found it to be the proximate result of Flynt's actions. Because the jury's verdict as to defendant Flynt stands the test of ratonality, it cannot be undermined merely by an attack on the sufficiency of the evidence presented at trial.

Defendants argue further than the jury's negative verdict on plaintiff's libel claim necessarily precludes a different finding on his emotional distress claim. Thus reasoning overlooks the fact that the latter tort is essentially a gap-filler, giving a remedy to victims of outrageous conduct for which there had been no recourse. That a plaintiff may not recover for certain conduct on libel grounds does not alone render it innocuous. *See Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc). The emotional distress tort "clearly is designed to protect the victim's emotional well-being, as distinct from the reputational interests historically protected in defamation law. Further, the examination in such a suit focuses more clearly upon the defendant's conduct." Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24, 27 (1983). Although liability does not extend to all otherwise unactionable conduct, Restatement (Second) of Torts § 46 comment d (1977), conduct

need not be defamatory in order to cause severe emotional distress.

In this case liability is predicated not on *Hustler's* publishing the ad parody, but on Flynt's contributing to the parody and appropriating it for his own malicious purposes. Rejecting plaintiff's libel claim, the jury found the publication itself not to be actionable. It served only as the vehicle by which plaintiff learned of Flynt's outrageous conduct. The parody as it appeared in *Hustler* is of only secondary importance, since plaintiff could have suffered emotional distress by learning otherwise of Flynt's attack. That the magazine provided, in this case, the element of causation should not be fatal to plaintiff's remaining cause of action for emotional distress.

B. HMI

Generally a corporation is liable for even intentional tortious acts of its officers and agents, acting in the ordinary course of their employment. *W.T. Grant Co. v. Owens*, 149 Va. 906, 912-13, 141 S.E. 860, 862 (Spec. Ct. App. 1928). A corporation that has not otherwise authorized a tortious act may instead ratify it — expressly or implicitly, by action or acquiescence — with the same effect as giving original authority to the officer or agent. *Piedmont Mt Airy Guano Co. v. Buchanan*, 146 Va. 617, 625, 131 S.E. 793, 794 (Spec. Ct. App. 1926). In the absence of such ratification or authorization, plaintiff may not recover punitive damages against a corporation that did not actually participate in the wrong. *W.T. Grant*, 149 Va. at 913, 141 S.E. at 862.

As editor and publisher of *Hustler*, Flynt could reasonably have been considered an agent of HMI. Although HMI might not have expressly authorized Flynt's actions, by reprinting the ad parody in March 1984, after plaintiff had filed this suit for emotional distress, HMI effectively ratified Flynt's earlier tortious conduct toward plaintiff. The corporation's liability derives, therefore, from the rule of respondeat superior, as applied to a tort committed by its agent Flynt and then ratified by the corporation. The significance of HMI's printing the ad parody a second time is not that the parody caused harm, but that HMI thus gave its stamp of approval to Flynt's malicious actions. Awarding both compensatory and punitive damages against HMI was properly within the jury's discretion.[2]

C. Conclusion

Defendants argue that denial of their j.n.o.v. motions would chill legitimate, protected speech, particularly in the form of political cartoons. This fear should be allayed by the unique facts here, which do not lend themselves to a broad statement of law. The admission of an individual defendant, under oath, that he had acted with the purpose of causing plaintiff emotional distress sets this case apart from any other known to

---

[2] Defendants contend that the jury's damage award is excessive and improper. Because plaintiff presented evidence that he had suffered severe emotional distress — not readily reducible to a dollar value in testimony — the verdict was not excessive. Nor was it improper, since defendants' conduct could reasonably be found to justify an award of punitive damages and since HMI's liability rests on respondeat superior.

the court. To have the defendant corporation then ratify such conduct further removes the instant controversy from the mainstream.

For these reasons, the court declines to upset the jury's verdict against defendants Flynt and HMI. Defendants' motions for judgment notwithstanding the verdict should be DENIED. An order consistent with this opinion shall be entered this day.

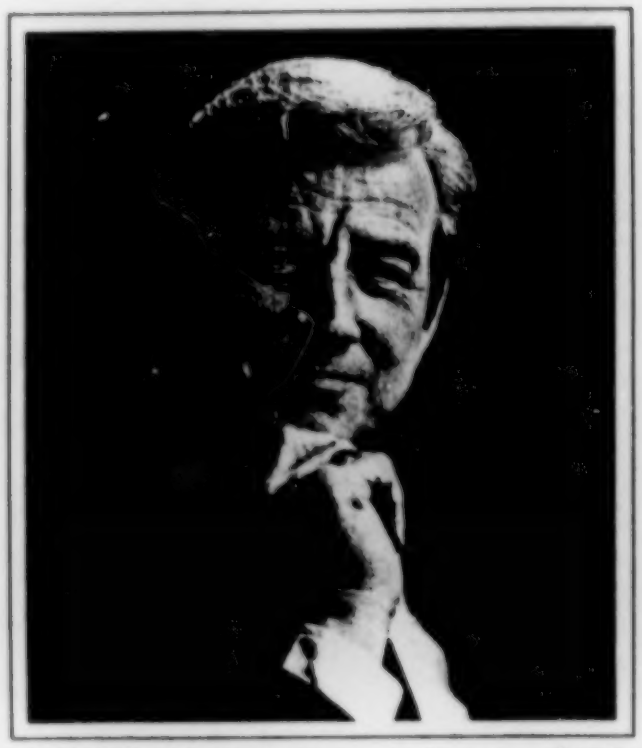
DATED: This 19th day of April, 1985.

James G Zagel

Chief United States District Judge

APPENDIX E

Jerry Falwell talks about his first time.*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . .

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you?



© 1983 – Imported by Campari U.S.A. New York, NY 48°proof Spirit Aperitif (Liqueur)

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. ***Campari. The mixable that smarts.***

CAMPARI® **You'll never forget your first time.**

*AD PARODY—NOT TO BE TAKEN SERIOUSLY

APPENDIX F

Los Angeles Times



"Let's nail all those editorial cartoonists!"

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on February 2, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Howard W. Rhodes, Jr.
Rhodes, Jennings
& Livingston
P. O. Box 1099
Lynchburg, VA 24505-1099
(3 Copies)

Norman Roy Grutman, Esq.
Jeffrey H. Daichman
Grutman, Miller, Greenspoon
& Hendler
505 Park Avenue
New York, N.Y. 10022
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 2, 1987, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1278

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,

Petitioners,

v.

REVEREND JERRY FALWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

NORMAN ROY GRUTMAN*
JEFFREY H. DAICHMAN
GRUTMAN MILLER GREENSPOON
& HENDLER
505 Park Avenue
New York, New York 10022
(212) 888-1900

Attorneys for Respondent

* Counsel of Record

Counterstatement of the Questions Presented

1. Whether a public figure who has proven knowing or reckless conduct by a publisher who deliberately set out to injure him, upset him and assassinate his integrity is barred by the First Amendment from recovering damages for the intentional infliction of emotional distress?

2. Whether a plaintiff who does not recover for defamation is automatically barred by the First Amendment from recovery under the tort of intentional infliction of emotional distress?

3. Whether this Court should review the evidence at trial to determine if the elements of the tort of intentional infliction of emotional distress were satisfied?

4. Whether the First Amendment prohibits damages where all of the elements of the tort of intentional infliction of emotional distress have been met?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,

Petitioners,

v.

REVEREND JERRY FALWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Reverend Jerry Falwell respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioners Hustler Magazine, Inc., and Larry C. Flynt to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Statement of the Case

This case does not present any constitutional issue deserving review. Instead, it involves the aberrant behavior of Larry Flynt, the publisher of Hustler Magazine, whose reckless and malicious conduct places him well outside the broad perimeters of constitutional protection. This conclusion is derived not from any novel application of the law, but from the facts present at trial, which portray an irresponsible publisher whose animus was to "assassinate" Reverend Falwell's integrity.

That the facts of this case are *sui generis* and unworthy of precedental value is illustrated by Flynt's own astonishing testimony, which was the focal point of the Court of Appeals' conclusion that the actual malice test had been amply satisfied:

> Q. Did you want to upset Reverend Falwell?
>
> A. Yes. . . .
>
> Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?
>
> A. He's a glutton?
>
> Q. How about a liar?
>
> A. Yeah, He's a liar too.
>
> Q. How about a hypocrite?
>
> A. Yeah.
>
> Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?
>
> A. Yes.
>
> Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?
>
> A. Yeah.
>
> Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?
>
> A. To assassinate it.

App. A at A4-5.•

• References to "App." are to the Appendix to the Writ of Certiorari.

As the district court observed in commenting upon the "unique facts" of this case "which do not lend themselves to a broad statement of law," "[t]he admission of an individual defendant, under oath, that he had acted with the purpose of causing plaintiff emotional distress sets this case apart from any other known to the court." App. D at D9-10. The malice standard was established directly from the mouth of Larry Flynt: "Rare indeed is the case where an individual defendant so readily admits his own culpable intent." App. D at D4.

Regardless of the label applied by Hustler, this case is not about an "ad parody," a satire or a political cartoon. The fear to constitutional values raised by petitioners and *Amici* are unwarranted here, where Larry Flynt freely conceded his purpose was not to "parodize" but to "assassinate."

REASONS FOR DENYING THE WRIT

I

There are no first amendment defenses to conduct which amounts to actual malice.

The Court of Appeals agreed with petitioners' argument that "they are entitled to the same level of first amendment protection in an action for intentional infliction of emotional distress that they would receive in an action for libel." App. A at A7.

Accordingly, petitioners' concern about their entitlement to constitutional protection misses the mark—what they are really dissatisfied with is the factual determination that actual malice was proven under the circumstances of this case. But that point of evidence and proof hardly rises to the level of a constitutional issue warranting this Court's attention.

A. The Actual Malice Standard Was Satisfied And Correctly Applied.

Despite petitioners' efforts to hide from liability by the "fig-leaf" of the label "ad parody," that gratuitous characterization "should not convey upon Flynt some magical immunity from suit." App. B. at B9. The key issue addressed by the Court of Appeals, therefore, was the proper application of the malice standard to the unique facts of this case.

The Court of Appeals held that: "While we agree that the same level of protection is due the defendants, we do not believe that the literal application of the actual malice standard which they seek is appropriate in an action for intentional infliction of emotional distress." App. A at A8-9. Instead, the proper application of *New York Times v. Sullivan*, 376 U.S. 254 (1964), to this case, focuses on culpability and emphasizes "knowing . . . or reckless" conduct rather than "falsity or . . . disregard for the truth." App. A at A10-11.

Petitioners understandably urge a rigid interpretation of the actual malice test in view of the jury finding that the publication could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated." App. C at C1. Because there was an absence of any false statement of fact, petitioners find it convenient for their defense to simplistically isolate the literal language of *New York Times* regarding a statement made "with knowledge that it was *false* or with reckless disregard of whether it was *false or not*." 316 U.S. at 279-80 (Emphasis added). However, the Court of Appeals did not fall into the trap of blindly applying this literal language from a libel case, but correctly evaluated the rationale underlying the *New York Times* rule to determine how the actual malice test would apply to torts which did not depend upon "falsity" as an essential element.

The Court of Appeals correctly recognized that the constitutional protection announced in *New York Times* related to an increase in "the level of fault" rather than an addition of a new element to the tort. App. A. at A10. The critical inquiry in applying the actual malice test is "culpability." App. A. at A10-11. In Virginia, the level of culpability required to meet the constitutional standard exists in the first element of the tort of intentional infliction of emotional distress: "intentional or reckless" conduct. App. A at A10-11.

The level of culpability required is not untargeted or generalized tortious intent, nor is it hatred, ill-will or bad motives; instead, it is the specific intent to cause severe emotional distress aimed directly at the plaintiff—which is precisely what the district court charged and what the jury reasonably found from the testimony of Larry Flynt.

Petitioners, who profess to be championing the First Amendment, are advocating the kind of simplistic approach that would drastically undermine the constitutional freedoms of writers and publishers. For example, in a work of fiction that could reasonably be understood as making factual statements,• a libel plaintiff would argue that actual malice has been established by the author's knowledge that he was writing fiction which by definition is false. Such a literal application of the actual malice standard destroys the constitutional principles which it was created to protect. As the district court observed in *Miss America Pageant, Inc. v. Penthouse International, Ltd.*, 524 F. Supp. 1280, 1283-84 (D.N.J. 1981):

> Under the New York Times test, a public figure plaintiff must show actual malice—knowledge of falsity or reckless disregard for the truth or falsity

• Compare *Bindrim v. Mitchell*, 92 Cal. App.3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), with *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983)

> of the publication. While such a test is easily applied to news items intended to convey truthful information, it is less clear how the Supreme Court would evaluate a work not intended to be truthful. It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a *falsity*, since such works are not intended to convey truth.

The constitutional protections of the actual malice test are not served by the thoughtless application of literal language, but by a court's ability to apply the principle to cases not involving falsehoods in a manner which focuses upon culpability as the measure of intentional or reckless misconduct.

Petitioners' reference to the literal language of *New York Times v. Sullivan*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), is not instructive, for the libel and invasion of privacy torts alleged in those cases all involved the element of *falsity*, either under a defamation theory or false light privacy theory. Moreover, the approach of the Seventh Circuit in *Hutchinson v. Proxmire*, 597 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979), is not inconsistent with the Court of Appeals' analysis. Because the allegation of intentional infliction of emotional distress arose "as merely the results of the statements made by the defendants," 579 F.2d at 1036, recovery was subject to the actual malice test, *id.* at 1036 n. 16. Since no actual malice was found in that case, summary judgment was affirmed. In a later decision, the Seventh Circuit explained that the absence of an allegation of *intentional* conduct against a media defendant fails to meet the constitutional standard. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983).

B. The Publication Involved Is Not Immune From Liability as Opinion or Rhetorical Hyperbole.

Petitioners casually mix the opinion doctrine pronounced in libel cases with the defenses available to the tort of intentional infliction of emotional distress. The decisions in the libel cases of *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1964), both turned upon the absence of false statements of fact; but neither involved a tort, such as intentional infliction of emotional distress, which does not require proof or falsity as an essential element.•

Conduct that satisfies the rigorous elements of the tort of emotional distress, even if speech is involved, may nevertheless create liability. See, *e.g.*, *Brown v. Loudon Golf & Country Club, Inc.*, 573 F. Supp. 399, 404-05 (E.D. Va. 1983); *Vietnamese Fisherman's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1011-14 (S.D. Tex. 1981); *Martin v. Municipal Publications*, 510 F. Supp. 255, 260 (E.D. Pa. 1981). As the Court of Appeals noted: "The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress." App. A at A11. There is nothing in the First Amendment that requires protection for the calculated, premeditated and deliberate infliction of harm targeted at a specific individual.

• *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), is distinguishable because of the absence of any fault or culpability on the part of the defendants. In a related case arising from the same facts, the district court granted summary judgment because of the "unrebutted evidence of the defendant's perception of the work as a piece of fiction." *Miss America Pageant, Inc. v. Penthouse International, Ltd.*, 524 F. Supp. 1286, 1287 (D.N.J. 1981).

Just as the First Amendment does not protect the use of "calculated falsehood" or "the lie, knowingly and deliberately published," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), no constitutional value is served by protecting the intentional infliction of emotional distress. The law must provide a remedy in such cases, for otherwise "the more vile and outrageous the statement about a public figure, the greater the protection to the publisher because the public is not apt to believe such a statement." App. A at A6 n.1.

Petitioners' fear that upholding this verdict will undermine the First Amendment and open the floodgates of litigation every time a public figure is criticized is easy to articulate but difficult to justify under the facts of this case. The record establishes that Larry Flynt did not intend the publication as legitimate parody, but rather deliberately set out to attack Reverend Falwell in order to accomplish his objective of character assassination.

As the court stated in *Time, Inc. v. Johnston*, 448 F.2d 378, 382 (1971), only "legitimate or normal hyperbole" will be protected, *id.*, at 380, but that protection may be lost where the commentary strays from the plaintiff's "public character" and becomes an assault on his "private life" or an "intrusion into his private affairs," *id.* at 380. The outrageous publication involved in this case together with its admitted objectives cannot possibly compare with the barbs of political cartoonists or the scathing pen of muckrakers. From a policy point of view, a line must be drawn to accommodate those rare instances of intentional wrongdoing which do not strictly fit within the libel mold.

II

The absence of reputational harm does not preclude a claim for emotional distress.

The district court correctly recognized that the tort of intentional infliction of emotional distress provides "a remedy to victims of outrageous conduct for which there had been no recourse," App. D at D7, and the Court of Appeals held that under the law of Virginia this tort has a distinct and separate existence, App. A at A12. Accord, *Chuy v. Philadelphia Eages Football Club*, 595 F.2d 1265 (3rd Cir. 1979) (*en banc*).

The essence of libel is damage to reputation, so that the offensive publication must be understood *by others* as accusing plaintiff by false statements of fact; the tort of emotional distress, on the other hand, focuses upon *plaintiff's reaction* to the outrageous conduct and does not necessarily depend upon what others may think of it. Prosser, Law of Torts, §111 at 737 (4th ed. 1971).

The law of Virginia recognizes the tort of intentional infliction of emotional distress as a distinct and independent cause of action. *Raftery v. Scott*, 756 F.2d 335, 339 n.4 (4th Cir. 1985). Few cases will pass the threshold requirements for the tort delineated in *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). App. A at A10 n.4. Few cases combine the outrageous and intolerable behavior proven here with the deliberate and premeditated intention of the publisher to engage in outright character assassination. There is absolutely no policy reason to extinguish the damages available under this tort in the absence of a successful libel claim. Indeed, the reverse is true, for it is only where a libel claim succeeds and damages for both reputational and emotional harm are recovered, does the separate existence of the emotional distress tort diminish in importance.

This Court has recognized that speech can be actionable in contexts other than a libel suit. For example, Va. Code §8.01-40 creates the same cause of action as New York Civil Rights Law §§50 and 51 where a person's name or likeness is used for purposes of advertising or trade without his written consent. Such a commercial use may be actionable, even though the proscribed advertisement contains no false statement of fact. *E.g., Time, Inc. v. Hill*, 385 U.S. 374, 381 (1967), indicating that there would be no constitutional problem with "[a]n application of that limited scope." Although there was likewise no false statement of fact broadcast in *Zacchini v. Scripps-Howard Broadcasting Co.*, 443 U.S. 562 (1977), this Court stated that "the protection extended to the press by the First Amendment in defamation cases" does not necessarily apply to violation of other state-created torts, such as the right of publicity. *Id.* at 514.• Thus, the protections given to the media by *New York Times* and its progeny simply do not grant publishers an "absolute license to destroy lives or careers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967).

III

Petitioners' question of trial evidence does not raise an issue for this Court to review.

Petitioners complain that the evidence of damages presented at trial fails to meet the threshold requirements under Virginia law. Such a contention fails to present any issue worthy of this Court's review, and was fully addressed by the Court of Appeals in its opinion.

There is nothing in the First Amendment that requires a reviewing court to alter traditional appellate procedure by injecting itself into an evaluation of the evidence and

• This Court also noted in *Zacchini* that freedom of speech does not protect the broadcast of a copyrighted work, *id.* at 575, even though no falsehoods are involved.

interfering with the jury process. The Court of Appeals recognized that reversal is warranted "only when there is a complete absence of facts to support the conclusions reached by the jury." App. A. at A12, citing *Sherril White Construction, Inc. v. South Carolina National Bank*, 713 F.2d 1047 (4th Cir. 1983). Accord, *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1158, 1166 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983). After reviewing the facts, App. A at A12-A14, the Court of Appeals concluded that the evidence was sufficient to sustain the jury's verdict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 5, 1987

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REPLY BRIEF

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No. 86-1276

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,

Petitioners,

vs.

REVEREND JERRY FALWELL,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
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On Petition for a Writ of Certiorari
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for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

Petitioners submit this Reply Brief in reply to the arguments raised in Respondent's Brief in Opposition to the Petition for Certiorari.

Although Respondent characterizes this case as *sui generis*, the fact is that the holding below threatens any member of the press who dares to criticize a public official or public figure and does so with animosity. Under the rule which Respondent urges,

even one who published the truth about a public figure but did so with express malice as defined at common law could be held liable for intentional infliction of emotional distress.

1. The Flynt Testimony Does Not Make this Case *Sui Generis*

By quoting an excerpt from the deposition testimony of Larry Flynt, Respondent attempts to characterize this case as a rare one in which the defendant admits his own culpability. In fact, however, Flynt's testimony does not transform this case into one where the First Amendment is irrelevant.

In the first place, the Flynt testimony in question is taken from a deposition in June, 1984, at a time when Flynt, a manic-depressive, was suffering from a severe manic episode which had caused him to engage in highly publicized activities which

placed his sanity in question. See *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). Flynt's rambling, raving testimony in the deposition was a product of his mental illness at the time. Ample evidence in the record, including psychiatric testimony, a videotape of the entire deposition itself, and the initial conclusion of the District Court itself, demonstrates that this testimony was not competent, and certainly was not credible. (Joint Appendix on Appeal, pp. 386-469, 471-472, 862-912, 1000-1397.)

Moreover, by the time of the trial (December 1984), Flynt had undergone medical and psychiatric treatment and recovered from his manic episode, and his testimony at trial revealed that his publication of the ad parody was not motivated in the slightest by hatred, ill will or a desire to harm

Respondent or his reputation. Rather, the only intention was to create a parody which nobody would take seriously. (Joint Appendix on Appeal, pp. 1212-1317.)

Even if the Flynt deposition testimony were credible (and see the discussion below, Section 4), however, it does not withdraw this case from the protections offered by the First Amendment. Respondent's reliance on the testimony is flawed for at least two reasons: (1) by its very terms, the testimony quoted by Respondent evidences an intent to harm Falwell's *reputation*, not an intent to cause him severe emotional distress. Thus, if as Respondent argues, the constitutional standard is satisfied by proof of intention to inflict emotional harm, the evidence cited by Respondent is off the mark. (2) If, as Petitioner

urges, the *New York Times v. Sullivan* "knowing or reckless falsity" standard applies, there can be no liability here because, as the jury already found, there was no falsity.

The Flynt deposition also does not make this case *sui generis* even though, as Respondent urges, it is rare for a defendant to admit malice. That observation simply refers to the type of evidence (i.e. direct rather than circumstantial) and begs the question whether anything other than knowing or reckless falsity can satisfy *New York Times*. It is immaterial to the constitutional issue presented here whether one can prove malice (1) out of the defendant's own mouth or (2) by circumstantial evidence. The proper question is: however one proves malice in a given case, is it the *type* of malice which satisfies the First

Amendment requirement?

2. The Conduct Here Does Not Amount to Actual Malice

Respondent contends that the Court of Appeals afforded Petitioners the same First Amendment protection that they would receive in a libel action. In fact, however, the Court of Appeals rejected the *New York Times* "knowing or reckless falsity" test for purposes of the emotional distress tort. The test adopted below renders anybody who strongly criticizes a public figure vulnerable to suit for intentional infliction of emotional distress and eviscerates the First Amendment protections enunciated in the Court's opinions of the past 23 years. The inevitable result will be a chilling effect on speakers wishing to criticize public officials or public figures but fear that it might be found that they

spoke out of hatred or ill will.

See, e.g., *Yorty v. Chandler*, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970). Anyone viewing the Paul Conrad cartoon (appended to the published opinion) in that case would have to conclude that the cartoonist published the editorial cartoon about Mayor Yorty with some degree of hatred and ill will. It is likely that the cartoonist would have testified that he hoped Mayor Yorty, a political adversary, would feel severe emotional distress upon reading the cartoon. Yet, can one seriously contend that Mayor Yorty should have been able to recover for intentional infliction of emotional distress in that case, had he been imaginative enough to plead it? As the *Yorty* opinion held,

> "To recognize the right of the Los Angeles Times to publish an unflattering and derogatory opinion

> of the mayor's qualifications for high national office ... is not to accept that opinion as gospel writ, but merely to hold that in a free country the Los Angeles Times, like everyone else, has a right to express its views on who should be appointed to public office, even though its views are those of a political adversary and are presented in rhetorical hyperbole." 13 Cal. App.3d at 473.

If the doctrine urged by Respondent is adopted as the law of the land, will cartoonists such as Conrad dare to exercise their rapier wit against hypersensitive public figures? Or will the Jerry Falwells of the world succeed in chilling such criticism by creating a new tort which lets them in through the back door where the law of libel long ago closed the front door to them?

Respondent contends that the proper focus of the *New York Times* test is whether the conduct is "knowing or reckless" rather than "falsity or ... disregard for the truth." In other

words, *New York Times* simply increased the "level of fault" but did not add the element of falsity to the tort of libel. Thus, Respondent concludes that the critical inquiry under *New York Times* is "culpability."

Respondent thus disagrees with the California Supreme Court, which noted in *Blatty v. New York Times Co.*, 42 Cal.3d. 1033 (1986), that *New York Times* added the element of falsity to libel where it previously had not been constitutionally required. (Quoted at p. 12 of the Petition for Certiorari. Petitioners agree with the California Supreme Court that *New York Times* is meaningless if the falsity requirement is read out of "actual malice."

According to Respondent, whenever speech or publishing are involved in allegedly tortious activity, the First Amendment is satisfied simply by

increasing whatever level of "culpability" the state chooses to impose for the tort in question to the level of "intentional or reckless" conduct. Such a conclusion is unprecedented and betrays a fundamental misunderstanding of *New York Times*.

In *New York Times*, the Court explained the reasoning for the requirement of "knowing or reckless falsity" by observing that "It is a prized opportunity to speak one's mind, although not always with perfect good taste, on all public institutions" and that "this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'" 376 U.S. at 269. The Court paid homage to the "profound national commitment" to "uninhibited, robust, and wide-open" debate, including "vehement, caustic, and sometimes unpleasantly sharp

attacks." *Id.* at 270. These principles relate not simply to the law of libel, but rather to all civil or criminal wrongs which implicate the First Amendment. See *id.* at 269.

The absurdity of Respondent's position is evident if one simply changes one fact in the case at bar. Assume that the matters related in the ad parody were true. Assume that Petitioners published the ad parody knowing that it was true, but also intending to cause emotional distress to Respondent. Applying Respondent's version of the actual malice standard, he could recover for such a truthful publication by alleging intentional infliction of emotional distress, because according to Respondent, falsity is not an element of the actual malice standard. Such a result is, of course, absurd, but it is exactly the

result which Respondent's and the Court of Appeals' version of actual malice requires.

3. Respondent's Analogy to Cases Involving Fiction is Misleading

Respondent warns that literal application of the *New York Times* standard would undermine freedom of the press in cases involving publication of fiction. Such an argument is nonsensical. One who intentionally writes fiction does not write with "actual malice" simply because he knows he is writing something "false" or "fictitious." The actual malice standard in such a case would be satisfied only by proof that the author knew that readers were likely to interpret his work as making factual statements about the plaintiff. See R. Sack, *Libel, Slander and Related Problems* 241 (1980); *Defamation:*

Problems with Applying Traditional Standards to Non-Traditional Cases--Satire, Fiction and "Fictionalization," 11 **Northern Ky. L. Rev.** 131, 155 (1984).

Indeed, the very case relied upon by Respondent supplies the answer to this supposed dilemma. In *Miss America Pageant, Inc. v. Penthouse International, Ltd.*, 524 F.Supp. 1280 (D.N.J. 1981), the court concluded that in the case of a fictional work, actual malice depended upon whether the defendants believed they were publishing fiction. *Id.* at 1286-1287.

Respondent's attempt to harmonize *Hutchinson v. Proxmire*, 597 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979), with the result below fails to explain how the damage allegedly suffered by Respondent in this case was anything other than "the results of the statements made by

the defendants." 579 F.2d at 1036. In fact, in *Hutchinson* the court simply concluded that because actual malice (i.e. knowing or reckless falsity) was not present, the plaintiff could not recover on any of his claims, including intentional infliction of emotional distress. Respondent implies that the Court found no intent to inflict emotional distress in that case. In fact, the Court did not make any finding one way or another on the question of intent to harm because such intent is irrelevant to the constitutional standard.

Respondent's reliance on a more recent Seventh Circuit case, *Brown & Williamson Tobacco Corp. v. Jacobson,* 713 F.2d 262, 274 (7th Cir. 1983), is ironic as well as misplaced. In fact, the court there rejected a similar attempt to plead around the protections

offered by the law of libel; the plaintiff in that case attempted to use the tort of wrongful interference with business relations in the same manner that Respondent has used the emotional distress tort here. The Seventh Circuit rejected this ploy in language equally applicable to the case at bar:

> "But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation--presumably to some purpose--is hedged about. We doubt that the Illinois courts would allow this end run around their rules on defamation, and we therefore need not consider any constitutional implications of their doing so." 713 F.2d at 274.

4. The Court Engaged in the Wrong Standard of Review

Even assuming, *arguendo,* that Respondent and the Court of Appeals are correct in concluding that all that is required by the First Amendment in this

case is a finding of "intentional or reckless" conduct, the Court of Appeals failed to apply the correct standard of review to this constitutional issue.

The Court of Appeals simply deferred to the jury's findings of fact, including its finding that defendants engaged in intentional or reckless conduct. However, it is the duty of the Court to engage in independent, *de novo* review of the constitutional defense. *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). There was no room for deference to the jury's conclusion.

Moreover, to pass muster under *New York Times*, proof of such intentional or reckless conduct would have to be by clear and convincing evidence. See *Philadelphia Newspapers, Inc. v. Hepps*, ___ U.S. ____, 106 S.Ct. 1558, 1562 (1986). In deferring to the

jury's verdict, the Court of Appeals ignored this higher burden of proof.

Thus, even if a literal application of the *New York Times* standard were inapplicable in this case, there is a grave constitutional defect in the Court of Appeals' dilution of First Amendment protections by simply deferring to a jury's finding, by a preponderance of evidence, that Petitioners acted willfully. Petitioners submit that based upon the entire record, there simply was not clear and convincing evidence to support a finding that defendants published the ad parody with constitutional malice.

5. Protection for Opinion Extends Beyond Libel Cases

Respondent argues that the cases establishing the defenses of opinion and rhetorical hyperbole are libel

cases involving falsity. Respondent fails to explain why the constitutional protection for opinion should apply only to libel. In fact, *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264 (1964), was brought under Virginia's insulting words statute, which reads very much like a definition of intentional infliction of emotional distress. See 418 U.S. at 268 n. 3.

Respondent relies upon *Brown v. Loudon Golf & Country Club, Inc.,* 573 F.Supp. 399 (E.D.Va. 1983) and *Vietnamese Fisherman's Ass'n v. Knights of Ku Klu Klan,* 518 F.Supp. 993 (S.D. Tex. 1981) for the proposition that conduct satisfying the requirements of intentional infliction of emotional distress may create liability "even if speech is involved." However, Respondent's own statement reveals the

difference between those cases and the case at bar. In this case, pure speech is involved. In the cases relied upon by Respondent, liability was imposed for conduct which included speech but also included additional tortious conduct, including threats. Although the First Amendment requires that with certain narrow exceptions, speech alone cannot give rise to liability, it certainly does not and cannot forbid liability for any conduct which includes speech. Speech is a component of virtually all human conduct. It is when one is punished for doing nothing more than speaking one's mind that freedom of speech is threatened.

In this case, Petitioners were punished simply because they engaged in the exercise of their First Amendment freedoms. No conduct other than the publication of an ad parody was

involved. Liability and substantial compensatory and punitive damages simply cannot be imposed for such expression.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

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v.

REVEREND JERRY FALWELL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE OF RICHMOND NEWSPAPERS, INC., AND THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VA., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court, Amici, which are described more fully in Appendix A, move the Court for leave to file the accompanying Brief Amicus Curiae of Richmond Newspapers, Inc., and The Free Lance-Star Publishing Co. of Fredericksburg, Va., in Support of Petition for a Writ of Certiorari. The Amici Curiae submitting this brief are publishers of daily newspapers in the Commonwealth of Virginia.

Amici have a substantial interest in the outcome of this petition, which will determine whether a public figure can circumvent the first amendment restrictions placed on actions for defamation by simply labeling his claim as one seeking recovery for the intentional infliction of emotional distress. As explained in the accompanying brief, the decision of the Court of Appeals directly threatens the ability of all publishers to express freely their views on editorial pages, in editorial cartoons, and in other commentary on subjects of public concern.

Petitioners are not in a position to represent fairly the views of Amici. The publication out of which this case arises was, in the eyes of many, indecent and outrageous. Amici are supporting it only because of the principle at stake in the case. The decision of the Court of Appeals would allow punishment not only for publications of the genre circulated by Petitioners, but also of expressions of opinions that are unpopular, unfair, or unconventional solely because they are intended to cause someone emotional distress and succeed in their effect. As such, the precedent set by the lower court's decision, if allowed to stand, will threaten the ability of Amici, and countless other publishers both large and small, to present a diversity of views on important public subjects. When viewed in this light, the case takes on a new, far more troubling dimension of which this Court should be aware.

Amici therefore move that this Court grant them leave to file the accompanying brief.

Respectfully submitted,

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Consent to file this brief was secured from counsel for Petitioners, but counsel for the Respondent declined to consent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1278

HUSTLER MAGAZINE, INC., *et al.*,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

BRIEF AMICUS CURIAE OF RICHMOND NEWSPAPERS, INC., AND THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VA., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI

The interest of Amici is set forth in the Motion For Leave To File Brief Amicus Curiae In Support Of Petition For A Writ of Certiorari, which has been bound with this brief. A description of Amici is set forth in Appendix A.

SUMMARY OF ARGUMENT

This Court, in holdings that encompass the entire landscape of first amendment decisions, has consistently refused to permit the abridgement of speech merely because it is emotionally disturbing or offensive to the recipient's sensibilities. Those holdings will be sabotaged if the artful and ingenious resort to emerging new tort theories is al-

lowed to curtail speech solely on the basis of its capacity to generate emotional disturbance.

The Court of Appeals mistakenly assumed that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. This effectively equated common-law malice with constitutional actual malice, despite the established axiom that proof that speech is published with common-law malice is not enough to satisfy the *New York Times* actual malice standard.

In light of the jury's finding that no reasonable person could interpret the ad parody seriously as a literal misstatement of fact, the lower court's ruling effectively revives the common-law notion of punishment for outrageous opinion. Opinions are often distress-inducing, calculated to provoke and disturb, often in emotionally incendiary language. But opinions do not forfeit their first amendment protection merely because they are harsh, indecent, or indecorous. The ad parody in this case caused no harm other than the infliction of emotional distress. The power of speech to generate severe emotional distress, however, is never enough, standing alone, to justify its abridgement. Speech may be curtailed by government only when it produces some other more palpable species of social harm which the government may seek to prevent.

Punishment of speech because it is intended to cause emotional distress threatens the country's long tradition of robust political and social satire. Satire is often effective precisely because it is shocking to mainstream cultural sensibilities. The satirist's very purpose is often to be outrageous, and it is an unavoidable consequence of the emotive power of satire that it may often carry more power to inflict pain than other genres of speech. The satiric attack in this case was admittedly outside of conventional mores. But if the attack is not otherwise punishable—if it is not legally obscene, if it does not contain defamatory lies, if it does not pose a clear and present danger of

violence—then it may not be proscribed merely because it is unconventional or unorthodox.

ARGUMENT

I. THE COURT OF APPEALS MISINTERPRETED THE CENTRAL PRINCIPLES UNDERLYING *NEW YORK TIMES CO. V. SULLIVAN* AND SUCCEEDING CASES.

A. The Court of Appeals Improperly Equated A Publisher's Intent To Cause Emotional Disturbance With Actual Malice

The Court of Appeals reasoned that because the cause of action for intentional infliction of emotional distress under Virginia law contains a requirement of intentional or reckless misconduct, it already has "built in" a level of fault equivalent to that required in the defamation context by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See Falwell v. Flynt*, 797 F.2d 1270, 1274-76 (4th Cir. 1986). The analysis of the Court of Appeals is superficially seductive. The imposition of the actual malice standard in public-figure defamation cases, the court argued, does not change the essence of the defamation tort; it merely raises the minimum threshold of fault. *Id.* at 1275. So, too, the court reasoned, the First Amendment should not be employed to alter the essential elements of the emotional distress tort, but rather should merely require a minimum threshold of fault equivalent to that which would be required in the defamation context. Since the record supported the conclusion that the publisher Flynt acted intentionally or recklessly to inflict emotional distress in publishing the ad parody, *id.* at 1276-77, Reverend Falwell had, according to the court, proved fault sufficient to satisfy first amendment requirements. *Id. Contra Blatty v. New York Times Co.*, No. L.A. 32173 (Cal. Dec. 29, 1986) (available Jan. 22, 1987, on LEXIS, States library, Cal.

file) ("Indeed, in . . . [*New York Times Co. v. Sullivan*] the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell court misses this crucial point and as a result cannot be followed.").

The fallacy of the lower court's logic is its assumption that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. In effect, the lower court has equated common-law concepts of malice, i.e. ill will, spite, or a desire to injure, with constitutional actual malice, i.e. knowing or reckless falsity. Yet it is axiomatic that these different kinds of intent are not the same; proof that speech is published with common-law malice is not enough to satisfy the *New York Times* actual malice standard. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 754 (1985); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 n.3 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964).

The difficult and novel question posed by the instant case is whether intent to cause emotional distress satisfies first amendment fault requirements when the essence of the tort is not a factual misstatement, but the infliction of the distress itself. To resolve that issue it is not enough simply to pluck the terms "intentional" or "reckless" out of the *New York Times* case, plug them into the elements of the emotional distress tort, and assume they mean the same thing.

When this Court "constitutionalized" part of the law of defamation in *New York Times Co. v. Sullivan*, it established a relational connection between the publisher's conduct and a specific risk: the risk of publication of a defamatory false statement of fact. The relationship between the publisher's conduct and the risk encompassed by the emotional distress tort is quite different, however,

from the relationship between the conduct and risk at stake in a defamation case. The term "actual malice" as used in *New York Times* is nonsensical when applied mechanically to the emotional distress claim in this lawsuit. One cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decision-making process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication.

It is only confusing to ask as did the Court of Appeals: "How should the standard of *New York Times Co. v. Sullivan* apply to this case?", for the "standard" in the *Times* decision was crafted for a different relationship between an actor's conduct and risk of social harm. The proper question to ask is: "How should the First Amendment be applied to a state's decision to impose penalties for this sort of conduct in relation to this sort of risk?" When conceived in those terms, the first amendment issue posed by this case is both profound and stark: May compensatory and punitive damages be awarded in a tort suit when a publisher acts intentionally or recklessly in relation to the risk that his publication will inflict severe emotional distress on another? The Court of Appeals' determination that such damages can constitutionally be awarded not only runs contrary to this Court's prior decisions, but threatens the very foundations of the tradition of parody and satire that have for so long been an integral part of the country's marketplace of ideas.

B. The Decision of the Court of Appeals is Contrary to the Assumption of Risk and Counterspeech Rationales of *Gertz v. Robert Welch, Inc.*

Two central rationales supporting this Court's current defamation rules apply well to emotional distress suits predicated on satiric attacks upon public figures. The first is assumption of the risk. In *Gertz* the Court held that one who enters the public arena must accept an increased

exposure to defamation as part of the price of fame and influence. 418 U.S. at 345. This aspect of *Gertz* largely reflects the common sense dictum that he who enters the kitchen must accept the heat of the fire.

If this first amendment principle requires that public figures assume some enhanced risks of being lied about, then surely it also applies with even more force to the increased risk of being subjected to emotionally distressing verbal attacks. As Professor Magruder noted long ago, "Against a large part of the frictions and irritations and clashing of temperament incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be. . . . [U]pon the contrary, it would be unfortunate if the law closed all safety valves through which irascible tempers might legally blow off steam." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035, 1053 (1936). Professor Magruder was writing about the sound management of the tort system, but fifty years later his words have taken on a constitutional dimension. *Gertz* teaches that there is an assumption of risk component to the First Amendment. This assumption of risk is an essential element to a pluralistic, robust, and open culture. *See* R. Smolla, *Suing the Press* 257 (1986). In the words of Judge Cardozo, "The timorous may stay at home." *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

The second rationale articulated in *Gertz* is the counterspeech principle. Public officials and public figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed; their very prominence insures some degree of access to the media, permitting them to correct the lie with counterspeech. 418 U.S. at 344. Once again, if access to the media as a means of self-help justifies substantial first amendment protection for defamatory speech, it is all the more a justification for constitutional protection of speech that has merely in-

flicted emotional injury. No matter what the technical name given to the cause of action, the common law has always been extraordinarily wary of permitting recovery for name-calling, insults, epithets, and verbal abuse, not merely because of the assumption of risk principle, but on the secondary rationale that such language reflects as negatively on the speaker as on the victim. *See Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966). The modern first amendment counterpart to this wisdom is that a public figure subjected to an outrageous satiric attack may very well be able to turn the tables on his attacker by using his own access to the media to display his outrage.

This case vividly illustrates the power of such counterspeech. Exercising his own first amendment prerogatives, Reverend Falwell launched an impressive counterattack against Flynt and *Hustler* magazine. Reverend Falwell's Moral Majority, Inc., sent out two mailings over Falwell's signature. One was a mailing to 500,000 "rank-and-file" members, which described the *Hustler* parody, and asked for contributions to help Falwell "defend his mother's memory." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986). A second mailing of 26,900 to "major donors" included a copy of the parody itself, with eight of the most offensive words blacked out. *Id.* A third mailing signed by Falwell, under the auspices of the Old Time Gospel Hour, was sent to 750,000 persons. *Id.* Reverend Falwell also used his television program to discuss the parody and counterattack Flynt, displaying the ad on nation-wide television. *Id.* Within thirty days of the mailings, the Moral Majority received $45,000, and the Old Time Gospel Hour received $672,000. *Id.* Falwell used his access to the media to attack Flynt with specific reference to the parody, as well as for a more generalized attack on pornography. These attacks did not mince words. Falwell wrote, for example:

> Now pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy

> plague. . . . And there, in my opinion, is clear proof that the billion dollar sex industry, of which Larry Flynt is a self-declared leader, is preying on innocent, impressionable children to feed the lusts of depraved adults. For those porno peddlers, it appears that lust and greed have replaced decency and morality.

Id. at 1154 n.7.

This counterattack by Falwell is precisely the sort of self-help remedy that this Court contemplated in *Gertz*. Rather than use the media to "counter the lie," of course, Falwell used it to "counter the distress" by bluntly and colorfully attacking Flynt. That attack was financially lucrative for Falwell, and it served as a useful device for combining his own emotive and cognitive use of language to further his own ideological positions. This is exactly the sort of response that the First Amendment is intended to encourage. The salvos between Flynt and Falwell give true meaning to the ideal of wide-open and robust speech. Nothing could be more antithetical to first amendment values, however, than to give either side the option of invoking the heavy machinery of the state tort system to exact compensation and punitive damages for the hurt feelings that may inevitably accompany these rough exchanges.

II. THE CAPACITY OF SPEECH TO CAUSE EMOTIONAL DISTURBANCE BECAUSE IT IS OUTRAGEOUS, IMMORAL, OR INDECENT IS NOT SUFFICIENT TO JUSTIFY ITS ABRIDGEMENT

A. Speech That is Mere Opinion or Rhetorical Hyperbole is Absolutely Protected by the First Amendment Even if it is Outrageous, Immoral, or Indecent

The jury's specific finding that no reasonable person could interpret the ad parody as a literal misstatement of fact renders this case indistinguishable from this Court's holding in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). In *Bresler*, this Court held that as

a matter of law the word "blackmail" in the particular circumstances of the case was not actionable. This holding was necessarily decided as a matter of federal constitutional law. The Court's ruling that the language was "rhetorical hyperbole" and therefore not actionable was not an exercise in interpreting common-law tort doctrine, but a constitutional holding that the First Amendment forbids exacting tort penalties for expressions that no reasonable reader could interpret as misstatements of fact. Surely Bresler suffered emotional distress from being the object of a "vigorous epithet" in a heated community controversy. But it is impossible to believe that if Bresler had been clever enough to include in his lawsuit a supplementary cause of action for emotional distress, this Court would have reached a different result on his claim. *See Blatty v. New York Times Co.*, No. L.A. 32173 (Cal. Dec. 29, 1986) (available January 22, 1987, on LEXIS, States library, Cal. file).

In *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), this Court had before it language every bit as emotionally incendiary as the ad parody at issue here. In the midst of a heated labor dispute a union newsletter printed a "list of Scabs" and included Jack London's scathing definition of a scab. That definition, the Court stated, was "merely rhetorical hyperbole, *a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.*" *Id.* at 286 (emphasis added).

This Court in *Letter Carriers* obviously believed that this "lusty and imaginative expression of contempt" was designed to inflict distress, to express disgust and contempt--and yet it was nonetheless not actionable, because it could not be reasonably understood as a literal misstatement of fact. *Letter Carriers* is an enormously important guide to the correct resolution of this case. In the rough and tumble of the controversies in American life, *Letter Carriers* instructs, vicious insults designed to cause

severe distress will be hurled about. But unless that emotion-laden speech carries with it some harm other than its capacity to outrage, such as factual misstatements, it is not actionable.

There was a time when the common-law protection for "opinion" or "fair comment" in defamation actions protected only "fair" or "reasonable" opinions. The "fairness" or "reasonableness" of the comment was usually left to the relatively unguided judgment of the jury. *See, e.g.*, R. Sack, *Libel, Slander, and Related Problems*, IV.3.6 (1980); R. Smolla, *The Law of Defamation*, 6.02[3] (1986). This practice permitted juries to pass judgment on the "worth" of the speaker's viewpoint, and it carried with it the potential for persecution of unpopular views. *See*, Hill, *Defamation and Invasion of Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1233 (1984).

When this Court stated in *Gertz*, 418 U.S. at 339, that "[u]nder the First Amendment there is no such thing as a false idea," it emancipated the outrageous or unpopular opinion from legal censure. "However pernicious an opinion may seem," this Court explained, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40.

A harsh or outrageous opinion directed against a public figure will virtually by definition be intentionally or recklessly designed to generate severe emotional distress. Opinions are always "intentional"; they are designed to have an effect. As Justice Holmes instructed: "Every idea is an incitement." *Gitlow v. New York*, 268 U.S. 652, 673 (1975) (Holmes, J., dissenting).

The use of the Virginia cause of action for emotional distress to punish Flynt for speech that the jury found not to be understood as fact is nothing more than the resuscitation of a cause of action for outrageous opinion. The second element of the cause of action, the requirement

that the conduct offend generally accepted standards of decency or morality, requires that the judge and jury do what *Gertz* forbids: examine their consciences to determine if the publisher's opinion was, in their minds, indecent or immoral.

Significantly, Virginia's own courts have interpreted the protection for opinion expansively. In *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 101-02 (1985), the Virginia Supreme Court recently held that both the Virginia and United States Constitutions "protect the right of the people to teach, preach, write or speak any such opinions, however ill founded, without inhibitions by actions for libel and slander." In *Crawford v. United Steelworkers, AFL-CIO*, 230 Va. 217, 335 S.E.2d 828 (1985), the court engaged in an analysis of this Court's decision in *Letter Carriers* that highlights the error of the Court of Appeals' analysis:

> By the same token, the words upon which the trial court fashioned liability here will not support recovery. The words are disgusting, abusive, repulsive, and are in no way condoned by this Court. Nevertheless, they cannot reasonably be understood, under the circumstances of this labor dispute, to convey a false representation of fact. To call a person a "cocksucker" does not, under the circumstances of this labor dispute, convey the false representation that the individual engaged in sodomy. Nor does calling a person a "motherfucker," under the circumstances of this case, convey the false representation that the person engaged in incest. Because this was a labor dispute and considering the way in which the words were used, these repulsive words will not support liability.

230 Va. at 234-35, 335 S.E.2d at 838-39.

The Court of Appeals ignored these decisions, and mistakenly reasoned that the absolute protection for opinion is irrelevant when the purpose of the tort is not to vindicate the victim's reputation, but to compensate the victim for the opinion's capacity to disturb emotionally. *Falwell v. Flynt*, 797 F.2d 1270, 1276 (4th Cir. 1986). An opinion, however, is no less an opinion because it is disturbing. Under the First Amendment the harsh, indecent, immoral, or outrageous opinion must simply be tolerated by the legal system; our society has other correctives. *See Gertz*, 418 U.S. at 339-40.

B. Speech Designed to Provoke Emotional Distress in Public Officials or Public Figures is Not Actionable, Even if Vulgar or Insulting, Unless it Poses an Imminent Threat of More Palpable Social *Harm*

In *Gitlow v. New York*, 268 U.S. 652 (1925), Justice Holmes said that "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." *Id.* at 673 (Holmes, J., dissenting). The same is true of the discourse in this case. The ad parody caused no harm other than the infliction of emotional distress on Falwell, an admitted public figure. The fact that the *New York Times* standard cannot be mechanically plugged into the emotional distress tort does not make the *Times* holding irrelevant. Rather, the *Times* case remains useful as part of the broader universe of first amendment cases that are instructive as to the relative weights of the competing interests posed in the emotional distress context. What is revealed by *New York Times* and its progeny, and first amendment cases in many other contexts, is this cardinal principle: the power of speech on issues of public concern to generate severe emotional disturbance in public officials or public figures is *never* enough, standing alone, to justify abridgement of that speech, even

when the infliction of emotional disturbance is intentional.* Speech may be curtailed by the government only when it produces some other more palpable species of social harm which the government may seek to prevent. As the Court explained in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

The First Amendment thus permits curtailment of speech that infringes a protected common-law property right in one's name or likeness, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), or that interferes with protected copyright interests, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), or that impedes the orderly administration of the selective service system, *United States v. O'Brien*, 391 U.S. 367 (1968). But in each situation the content of the speech is not being regulated because of its intellectual or emotional

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* A different constitutional balance may be stuck with speech involving private figures and no issue of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Connick v. Myers*, 461 U.S. 138 (1983). *See generally* Restatement (Second) of Torts §46, Comments d, e, f (1965) (providing illustrations of purely private speech that may give rise to claims for intentional infliction of emotional distress).

impact as such, but because the speech interferes with a legitimate social interest other than disagreement with or disquiet from the content of the speech. Similarly, in defamation and false-light invasion of privacy actions, the causes of action concern more than the protection of reputation and emotional tranquility; they also serve the state's interest in deterring the publication of damaging false information. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984) (state has interest "in safeguarding its populace from falsehoods."). Because there is "no constitutional value in false statements of fact," *Gertz*, 418 U.S. at 339, a state may provide remedies for the emotional injuries arising from such false statements. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976). So, too, states may legitimately ban obscene publications, after meeting the relatively rigorous definitional requirements of obscenity, because constitutionally obscene material has been declared by this Court to be utterly devoid of first amendment value. *See Miller v. California*, 413 U.S. 15 (1973). In the special first amendment context of broadcast regulation, with the unique social interests at stake in the regulation of the broadcast spectrum, the government also possesses a narrow power to regulate vulgar speech that does not rise to the level of the legally obscene. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Never, however, has this Court permitted speech to be abridged because of its emotional impact alone. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others . . . .").

No one can deny, for example, the intense emotional distress that may be generated by the spectacle of members of the American Nazi Party marching in uniformed lock-step through a Jewish community, or by hooded members of the Ku Klux Klan burning crosses, and shouting vicious slurs against Blacks, Jews, and Catholics. Yet it is now axiomatic that such speech, however offensive to

mainstream values solicitous of racial and religious tolerance, is nevertheless protected unless it poses a clear and present danger of lawless action, a test that requires that the impending violence be imminent and likely. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court upheld a criminal conviction against a Jehovah's Witness for uttering "fighting words" to a city marshall in the course of an incident arising from a hostile crowd reaction to the appellant's proselytizing on the street. The Court stated that certain "well-defined and narrowly limited" classes of speech "have never been thought to raise any Constitutional problem," including "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 571-72. In the years since *Chaplinsky* this Court has made it clear that the "fighting words" concept embraces only those sorts of face-to-face confrontations that threaten to provoke immediate violence. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1970) ("No individual *actually or likely to be present* could have regarded the words . . . as a direct personal insult.") (emphasis added). *See also, Chaplinsky*, 315 U.S. at 573 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

Most significantly for the purposes of Reverend Falwell's claim in the instant case, this Court has solidly rejected the view that insults and vulgarities may be penalized merely because they offend the recipient's sensibilities. In *Cohen v. California*, 403 U.S. 15 (1970), in which the defendant wore the words "fuck the draft" on his jacket, the Court emphasized that the state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to hostile reaction." *Id.* at 20. Rather, the Court emphasized that the state was

attempting to penalize *only* the fact of communication. *Id.* at 18. This, the Court held, the state could not do.

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

Id. at 25.

Similarly, in *Street v. New York*, 394 U.S. 576, 592 (1969), a flag desecration case, the Court wrote:

> [a]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

See also Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

The ad parody in this case was neither gentle nor genteel; its shock effect was purposeful and, to most, offensive. But the parody cannot be penalized for that offensive shock effect alone, without turning back the clock on decades of entrenched first amendment doctrine.

III. PUNISHMENT OF SPEECH BECAUSE IT IS INTENDED TO CAUSE EMOTIONAL DISTRESS THREATENS THE COUNTRY'S LONG TRADITION OF PARODY AND SATIRE

It is easy to be repulsed and offended by the speech under attack in this case. The words published by Hustler were appropriately described by Judge Wilkinson as a

"base parody" that is "unworthy" of the grand American tradition of public satire. *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing *en banc*). That this is so, however, does not justify the creation of a legal theory of liability so broad and undefined that it threatens satiric commentary of all kinds.

The use of satire in public debate has a long and established tradition in this country. *See Falwell v. Flynt*, 805 F.2d at 487 (Wilkinson, J., dissenting from denial of rehearing *en banc*). From Phillip Freneau's *National Gazette*, through H. L. Mencken, Sinclair Lewis, and the muckrakers of the early twentieth century, to the modern day editorial page writer or cartoonist, satirists have criticized, excoriated, and vilified public figures. Sometimes their criticisms have been justified, sometimes not. But through it all, this Court and those who shape our legal doctrine have recognized that we must take the bad with the good if we are to maintain the vigorous exchange of viewpoints so fundamental to our democracy.

"Probably no great public figure in our history has ever suffered under so scurrilous a barrage of abuse and lies as [Thomas] Jefferson." F. Mott, *Jefferson and the Press* 38 (La. State U. Press 1943). Yet Jefferson's response was not to advocate the creation of government-imposed sanctions designed to curtail debate; to the contrary, his views, embodied in the First Amendment, were to fight such abuses by keeping open the free exchange of ideas in the ideological marketplace. *See id.* at 43.

Judge Wilkinson pointed out in his dissent from the denial of a rehearing *en banc*:

> Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire is particularly relevant to political debate because it tears down facades, deflates

> stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air. While Hustler's base parody is unworthy of this or any tradition, the precedent created by the cause of action against this defendant may one day come to stifle the finer forms of this genre.

Falwell v. Flynt, 805 F.2d at 487.

Satire is often effective, in fact, precisely because it is shocking to mainstream cultural sensibilities. The satirist's very purpose is often to be outrageous and indecent, to incite anger, revulsion, and controversy. *See* Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B. U. L. Rev. 923, 924-26 (1985). The "bite" of satire is precisely what supplies its potency. *Id.* at 924.

One unavoidable consequence of the emotive power of satire is that it may often carry more power to inflict pain than other genres of speech. It is a fact of American life that an attack on a public figure in a context such as Gary Trudeau's comicstrip, *Doonesbury*, may have more impact than scores of detached analytic essays by commentators on op-ed pages. But it has never been part of our first amendment jurisprudence to penalize speech because it is effective.

The chill on the exercise of free expression posed by this sort of use of the emotional distress cause of action is compounded by the inability of the speaker to predict in advance what a jury will later determine to be "out of bounds" in terms of "decency" or "morality." The critical operative standard for this tort, when applied in the speech context, is impermissibly vague. To be actionable the speech must offend "generally accepted standards of decency and morality." *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). The $100,000 punitive

damages component of the jury award in this case was punishment for having run afoul of that standard. But speech may not be penalized when the controlling standard is capable of sweeping and improper application, or if its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967).

An amorphous and fluid standard such as the phrase "generally accepted standards of decency and morality" invites a jury to impose liability because of its distaste for the publisher or his views, rather than for any concrete harm caused by what is published. Consider, for example, an editorial cartoon depicting President Reagan in an S.S. uniform goosestepping his way through Germany's Bitburg Cemetary. Or Gary Trudeau's recent lampoon of Reverend Pat Robertson as obtaining divine guidance in charting his presidential campaign. Do these offend generally accepted standards of decency or morality? *Amicus* Richmond Newspapers refused to run the Doonesbury cartoons on Reverend Robertson, because of a belief that they would be "extremely offensive to thousands of . . . readers." Richmond Times-Dispatch, Sept. 17, 1986, at B-1. Many others, including *amicus* Free Lance-Star, published Trudeau's work, *id.*, but would they have done so had they faced the possibility of an enormous money judgment because the cartoons upset Reverend Robertson?

The famous statement in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), describing a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open" was not a mere slogan. The words "uninhibited" and "wide-open" gather their force when they are extended to protect speech at the fringes, speech that is indecorous and irreverent. No First Amendment protection would be necessary if all American speech were polite, genteel, and restrained. But as the Court in *New York Times* emphasized, our national character is more robust; our market-

place of speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Description of Amici

Richmond Newspapers, Inc. is a Virginia corporation that publishes a morning newspaper, the *Richmond Times-Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation of 230,878), which are distributed in twenty-one cities and seventy-two counties throughout the Commonwealth of Virginia.

The Free Lance-Star Publishing Co. of Fredericksburg, Va. is a Virginia corporation that publishes an afternoon newspaper, The Free Lance-Star (circulation approximately 35,000), six days each week in Fredericksburg, Virginia and surrounding counties.

AMICUS CURIAE

BRIEF

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No. 86-1276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS, HUSTLER MAGAZINE, INC. AND LARRY C. FLYNT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-1276

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Reporters Committee for Freedom of the Press, as amicus curiae in the accompanying proposed brief, hereby moves the Court, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, for leave to file the proposed brief amicus curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

The grounds for this motion are that the Reporters Committee, having a direct and immediate concern regarding limitations on expressions of opinion protected by the First Amendment, wishes to file the attached proposed brief and has obtained written consent from the Petitioners, Hustler Magazine, Inc. and Larry C. Flynt, which has been filed with the Clerk of this Court. The Reporters Committee has also requested written consent from Respondent, but consent was refused.

Because of the serious First Amendment implications of this case, particularly with respect to the protection of parody as an essential form of social and political commentary, the Reporters Committee, as amicus curiae, submits that the points raised in the accompanying proposed brief would be helpful to the Court's consideration of the Petition for Writ of Certiorari.

For the foregoing reasons, the Reporters Committee respectfully requests that this Motion for Leave to File Brief Amicus Curiae be granted.

Respectfully submitted,

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IN THE
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No. 86-1276

HUSTLER MAGAZINE, INC. and
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Respondent.

On petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit.

BRIEF AMICUS CURIAE FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS, HUSTLER MAGAZINE, INC., AND LARRY C. FLYNT

INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information.

The question presented by this case involves the parameters of First Amendment protection for expression of opinion, in this case satire and parody. The Petitioners have been financially punished for publishing a "spoof" of a very public aspect of Respondent's personality.

The interest of the Reporters Committee for Freedom of the Press as amicus curiae focuses on the dangerous and unwarranted impact this decision will have on editorialists, cartoonists and comedians -- in fact all those in the business of expressing their opinion. Although the Reporters Committee recognizes the possibility that words can wound in certain instances, what is more important is that the awarding of damages in these situations is often a pretense for the suppression of unpopular or offensive ideas. This is intolerable,

for the fundamental purpose of the First Amendment is to protect even the most abhorrent of ideas.

The Reporters Committee is actively involved in defending the First Amendment rights of the media, and takes great interest in cases where these rights are in jeopardy. One of the most essential rights of the free press is the right to criticize those voluntarily in the public spotlight.

This includes responsible, factually based criticism, but further extends to criticism which is sarcastic and satirical. Speech which falls within the latter category, particularly when it focuses on the very viewpoints the Respondent so vehemently advocates, must be held to fall within the strong First Amendment protections.

The Reporters Committee views the Fourth Circuit's decision as a direct

violation of the crucial liberties which are necessary to maintain a free and vigorous press. Without latitude in expression of opinion, the First Amendment becomes a nullity. For these reasons, amicus respectfully asks the Court to grant Petitioners' Writ of Certiorari.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth by Petitioners.

SUMMARY OF ARGUMENT

Petitioners have set out concisely the compelling grounds on which they seek review of the judgment in this case. The Reporters Committee supports that petition on the grounds raised therein and respectfully emphasizes four points. First, the purpose and function of the First Amendment is to promote wide and critical debate both about matters of public concern and about public figures. To penalize Petitioners for publishing a satirical expression of opinion about someone voluntarily in the public eye, particularly when that satire focuses on the particular viewpoint the Respondent so strongly advocates -- his own morality -- would destroy the important underpin-

nings of the First Amendment.

Second, the First Amendment was not designed to protect only favorable comment. If this were so, it would be useless and inoperative. The press has traditionally enjoyed protection of a whole host of commentary, both favorable and unfavorable. The fact that certain criticism of those who have voluntarily chosen the public spotlight is personally assaultive does not steer that criticism out of the protective zone afforded it by the First Amendment. According to the late Honorable Learned Hand, "Indeed it is not true that all ridicule or disagreeable comment is actionable; a man must not be too thin skinned or a self important prig." Frank v. N.B.C., 506 N.Y.2d 869, 872 (1986), quoting Burton v. Crowell Pub. Co., 82 F.2d 154, 155 (2d Cir. 1936).

Extending First Amendment protection

to the type of expression at issue here would not deviate from the fundamental purpose of the First Amendment. Indeed, it would remain consistent with the drafters' intent to promote uninhibited liberty of speech, particularly when it involves public figures and issues. Furthermore, the mode Petitioners have chosen to voice their opinion about Respondent should not alter the level of protection afforded them. Whether through scathing editorial or foolish caricature, the avenue of expression should not be the focus of the debate. It is irrelevant that a particular parody may be offensive to some, for "what is one man's amusement is another's calumny." Polygram Records v. Superior Court, 216 Cal. Rptr. 252, 258, 170 Cal.App.3d 543 (1985). Furthermore, "Denying parodists the opportunity to poke fun at symbols and names which be-

come woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression." L.L. Bean Inc., v. Drake Publishers, Inc., et al., No. 86-1202, 86-1203, slip op. at 19 (1st Cir. Feb. 10, 1987).

Third, because Petitioner's parody is absolutely protected as opinion, Respondent may only recover damages if actual malice can be proven. Therefore, the rule of New York Times v. Sullivan, 376 U.S. 254 (1964), should be applied to Respondent's emotional distress claim. Allowing Respondent to recover for distress without proof of malice is in effect allowing him to circumvent the carefully developed boundaries of libel law. This is an impermissible expansion, which makes the notion of a free press illusory.

Finally, because Petitioners' parody was not libelous, Petitioners should not

be held responsible for injuries arising from it. Although the jury in this case found that the Petitioners had not libeled the Respondent, it nevertheless awarded him damages in the amount of $200,000. This damage award has no legal basis, and should not be allowed to stand. The jurors allowed their intuitive feelings of sympathy to outweigh the constitutional freedom to express opinions, whether flattering or cruel. Allowing judges and juries to censure unpopular ideas destroys the very core of the First Amendment: the protection of the advocacy of ideas. To permit recovery for a public figure on the grounds that he or she suffered "personal pain" amounts to a fine for speaking freely -- a notion rejected by the framers, who found free speech and press to be essential to a democratic society.

ARGUMENT

I. Permitting Financial Liability for a Parody of the Most Visible Portion of a Public Figure's Personality Thwarts the Fundamental Purposes of the First Amendment.

The protection afforded by the First Amendment was intended, and has been interpreted, to extend most clearly and broadly to comment on public figures and issues of public concern. Roth v. U.S., 354 U.S. 476, 484 (1956). Such comment is, ". . . in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'" Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788).

Because Respondent has "thrust himself to the forefront" of the very public and emotional debate over religious belief, and is pervasively known for his outspoken views on human morality, he is a public figure. Gertz v. Welch, 418 U.S. 323 (1974). By zealously advocating moral

purity, he has thrust his own morality into the arena of public debate, inviting attention and comment. Id. His morality has, of his own hand, become an issue of public interest, about which the First Amendment permits uninhibited debate. New York Times v. Sullivan, 376 U.S. 254 (1964). Penalizing Petitioners for commenting publicly on Respondent's morality, however tastelessly, sanctions disregard for the First Amendment and the protection it extends to comment on public figures and issues.

The rationale for protecting comment on public issues is two-pronged. First, unrestricted comment on matters of public interest has been deemed essential to our democratic system of government, Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984)(en banc), cert. denied, ___ U.S. ___, 105 S.Ct. 2662 (1985), because it advances "truth, science, morality and the arts in

general," as well as responsible government. Letter to Inhabitants of Quebec, 1 Journal of Cont. Cong. 108.

Second, public figures like Respondent who inject themselves voluntarily into a public controversy have greater responsibility to accept, and are better able to defend themselves against, the comment they invite. Belli v. Berryhill, 11 Med.L.Rptr. (B.N.A.) 1221 (Cal. Ct. App. 1984).

This two-pronged rationale would extend to any comment directed at Respondent's public activities, but applies with particular force to the parody published by Petitioners, which attacks the very issue Respondent has thrust into the public eye, his morality. Only through uninhibited comment -- positive and negative -- can the public determine how Respondent's teachings should shape their own religious beliefs. Freedom of

discussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the issues of their time. Thornhill v. Alabama, 310 U.S. 88, 102 (1939).

Imposing liability on Petitioners thus doubly abridges First Amendment rights: it denies Petitioners' right to publish, and forecloses the public's right to receive and comment on an issue of public interest.

Such comment is particularly important where, as here, Respondent is unrestrained by the political process. Respondent is not an elected public official. The offices he holds are privately created and funded and, hence, are immune from the formal democratic electoral process. Public comment is the only means by which society can attempt to influence his conduct. Curtis Publishing

Co. v. Butts, 388 U.S. 130 (1967)(Warren concurring).

Further, Respondent has extensive access to the media, by which he can expose the alleged falsity of the statements in the parody. Whitney v. California, 274 U.S. 357, 377 (1926).

Permitting recovery for Petitioners' parody thwarts the First Amendment's intent to protect comment on public figures and issues of public concern, abridges the public's right to unrestricted information on public issues, and affords Respondent unprecedented and undue protection from the comments his public activities invite.

II. Precedent Supports Extending First Amendment Protection to Petitioners' Parody, Despite its Editorial Orientation.

Extending constitutional protection to Petitioners' parody is entirely consistent with the First Amendment and

the cases interpreting it. As suggested, the parody, however tasteless, falls squarely within the First Amendment's protection for uninhibited comment on issues of public interest.

The purpose of parody, frequently, is to shock. "Since parody seeks to ridicule sacred verities and prevailing mores, it inevitably offends others, as evinced by the shock which Chaucer's Canterbury Tales and Voltaire's Candide provoked among their contemporaries." L.L. Bean, Inc., v. Drake Publishers, Inc., et al., No. 86-1202, 86-1203, slip op. at 6 (1st Cir. Feb. 10, 1987).

The parody's editorial orientation does not rob it of the First Amendment protection to which it is entitled. Constitutional protection does not turn on the "truth, popularity or social utility of the ideas and beliefs" advanced. New York Times v. Sullivan, 376 U.S. 254, 271

(1964) quoting N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1962). First Amendment standards are not adjusted to a particular type of publication or a particular subject matter. Pring v. Penthouse International, Ltd., 695 F.2d. 438, 443 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

First Amendment protection is not limited to benign comment or favorable review, to statements or positions that are accepted, decent and popular, that are constructive or have some redeeming element, or that do not deviate from community standards or prevailing religious or moral standards. Id. "The first amendment, . . . does not warrant inquiry into 'measures of distress or offensiveness, depending on the reader, listener or viewer.'" L.L. Bean, Inc., v. Drake Publishers, Inc., et al., No. 86-1202, 86-1203, slip op. at 18 (1st Cir. Feb.

10, 1987), quoting United States v. Guarino, 727 F.2d 864, 867 (1st Cir. 1984)(en banc).

On the contrary, the First Amendment's protective umbrella covers a vast spectrum of unfavorable comment, including views vastly divergent from prevailing community standards or "repugnant in the extreme," Pring, supra, 695 F.2d at 443; N.A.A.C.P. v. Button, 371 U.S. 415 (1962) and Terminiello v. Chicago, 337 U.S. 1 (1948) (vigorous and provocative advocacy); Gertz v. Welch, 418 U.S. 323 (1974) and Button (falsehoods); New York Times v. Sullivan, 376 U.S. 254 (1964) (harsh and abusive criticism); Bridges v. California, 314 U.S. 252 (1941) and Button, (information of questionable social value).

Extending First Amendment protection to Petitioners' parody requires neither a break with precedent nor an unwarranted

enlargement of the freedom of speech and of the press. "Parody is often offensive, it is nevertheless 'deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism.'" L.L. Bean Inc., v. Drake Publishers, Inc.,et al., No. 86-1202, 86-1203, slip op. at 16 (1st Cir. Feb. 10, 1987) quoting Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), cert. denied, 379 U.S. 822 (1964). Therefore, such protection preserves the uninhibited debate on public issues to which this country is profoundly committed.

A. Petitioners' Parody is an Expression of Opinion. As Such, It is Protected Absolutely by the First Amendment.

The challenged parody satirized a liqueur advertising campaign, and through it Respondent's teachings on human morality, by recounting a fictitious conversation in which Respondent supposedly spoke of his "first time." The parody was accompanied by two disclaimers instructing the reader not to take it seriously. At the conclusion of Petitioners' trial in U.S. District Court, the jury found on special verdict that the parody could not be understood as describing actual facts about Respondent or actual events in which he had participated.

Where the parody's explicit message was clearly not factual and was not intended and could not reasonably be understood literally, the parody must be judged for its implicit message, i.e., that Petitioners do not accept Respondent's protestations of his own morality. This implicit message, the only message the parody truly conveyed to its readers, is pure opinion. As such, it cannot give rise to liability.

Opinion is absolutely protected under

the First Amendment. Gertz v. Welch, 418 U.S. 323 (1974). The privilege applies whether the subject of a published opinion is a private or public figure. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert.denied, ___ U.S. ___, 105 S.Ct. 2662 (1985), Rest. (2d) Torts §566 (1977) Comment c, and whether the opinion expressed is favorable or "pernicious." Gertz v. Welch, 418 U.S. 323 (1974).

The rationale for protecting opinion is compelling. Opinion cannot be false; it is neither offered nor interpreted as fact, and thus is not susceptible to verification. Id.; Lewis v. Time, Inc., 710 F.2d 549, (E.D. Cal. 1983). It is, and must be, taken with a literary and legal grain of salt.

Consequently, the appropriate remedy for unfavorable opinion is counter-opinion, not court-awarded damages. "However pernicious an opinion

may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Welch, 418 U.S. 323, 339 (1974). The counter-opinion remedy is particularly appropriate for parties like Respondent who have virtually unlimited access to money, media and vast audiences and can expose the alleged fallacies of unfavorable opinion by publishing or broadcasting a rebuttal.

Imposing liability on Petitioners for publishing their opinions about Respondent robs Petitioners of the absolute protection to which opinion is entitled, and affords Respondent a judicial remedy where it has been expressly held none is warranted.

B. Petitioners' Parody Does Not Lose Its First Amendment Protection Because the Opinions it Conveys are Couched in Rhetorical Hyperbole.

To convey their opinion of Respondent's fitness to serve as a national moral leader, Petitioners concocted a fictitious conversation in which Respondent supposedly recounted having incestuous relations with his mother. Using such conceded literary excess, or rhetorical hyperbole, Petitioners drew into question Respondent's protestations of his own morality, leaving readers with a clear, if blunt, sense of Petitioners' opinion.

Petitioners did not forfeit their opinion privilege by opting to convey their opinion using rhetorical hyperbole. Critics and editorial writers are permitted to resort to caricature, rhetorical license, even "caustic bombast" to stimulate public reaction. Myers v.

Boston Magazine Co., Inc., 403 N.E.2d 376, 381 (Mass. 1980); National Rifle Assn. v. Dayton Newspapers, Inc., 555 F.Supp. 1299 (S.D. Ohio 1983). In the realm of religious faith and political belief, critics may resort to exaggeration and vilification of men who are prominent in the church and state to persuade others to their points of view. Cantwell v. Connecticut, 310 U.S. 296, (1939).

More importantly, First Amendment standards are not adjusted or diluted according to the type of publication or subject matter. Pring, 695 F.2d at 443. Opinion expressed in rhetorical hyperbole is protected to the same extent as conventional opinion -- absolutely -- if a reader cannot infer from it any factual content. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, ___ U.S. ___, 105 S.Ct. 2662 (1985). Even

facially factual statements are protected if they cannot reasonably be understood to be meant literally and seriously and are obviously "mere vituperation and abuse." Rest. (2d) Torts §566 comment e.

This protection reflects a national recognition "(t)hat, in spite of the probabilities of excesses and abuses, these liberties are...essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Cantwell v. Connecticut, 310 U.S. 296, 310 (1939).

To determine whether the challenged rhetorical hyperbole is free of factual content, and thus protected as opinion, the court must consider the context within which it was published, including the medium and its intended audience, Information Control Corp. v. Genesis One, 611 F.2d 781, 784 (9th Cir. 1980), and the social conventions and

customs inherent in different types of writing. Ollman, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, ___ U.S. ___, 105 S.Ct. 2662 (1985).

This contextual analysis requirement recognizes that even a facially defamatory statement may be protected as opinion if the medium in which it appears, and the style in which it is written, is so traditionally hyperbolic and excessive that the intended audience is on alert not to interpret the statement literally. See Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971)(sports writer's report that pro basketball player Bill Russell "destroyed" Neil Johnston deemed protected); Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass. 1980)(review in annual "Best and Worst of Boston" feature claiming "worst" sportscaster was enrolled in remedial speaking class deemed protected opinion).

The requirement recognizes as well that even apparent statements of fact may assume the character of opinion, and thus be privileged, when made in public debate, labor disputes, or other circumstances in which the audience may anticipate efforts by the parties to persuade others to their positions by using "epithets, fiery rhetoric or hyperbole." Information Control, 611 F.2d 781 (9th Cir. 1980).

Under this circumstantial/contextual approach, the First Amendment's opinion privilege has been held to protect, inter alia, strike literature reprinting Jack London's vivid and scathing definition of a "scab," Letter Carriers v. Austin, 418 U.S. 264 (1974); and a news report quoting a city politician who, at a city council meeting, called a developer's requests for eased zoning laws "blackmail,"

Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6 (1970).

The opinion privilege extends as well to those hyperbolic statements that cannot be understood as fact because their very content is so outrageous that it could not conceivably be true. Thus, in Pring v. Penthouse, the privilege was held to protect a parody that claimed a Miss America contestant had oral sex on stage with her coach, on national television, while the new Miss America was being crowned. 695 F.2d at 443.

In dismissing the contestant's defamation action, the court wrote, "The charged portions of the story describe something physically impossible in an impossible setting,...(I)t is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else." Id. at 443. Where "even

the most careless reader" could discern that the parody did not convey fact, the court had no "alternative" than to find the parody protected as opinion under the First Amendment. Id.

The court rejected the contention that the parody's divergence from "prevailing religious or moral standards" necessitated more restrictive analysis. "Although a story may be repugnant in the extreme to an ordinary reader...the typical standards and doctrines under the First Amendment must nevertheless be applied. The magazine itself should not have been tried for its moral standards." Id.

To summarize, the First Amendment's opinion privilege extends in three broad circumstances to rhetorical hyperbole that cannot reasonably be understood to convey fact: where the type of writing, or the medium itself, is so traditionally

rife with hyperbole that readers know not to take the words literally; where the circumstances surrounding publication alert the audience to anticipate the use of hyperbole; and where the challenged statement is in itself so outlandish that even the most careless reader can discern it was not intended as a statement of fact.

Petitioners' parody fits squarely into all three circumstances: it was published in a magazine known for its bold editorial bent, and to an audience accustomed to the stinging satire common in that magazine and the entire genre of adult magazines; it was published in the course of an informal social and philosophical debate on human morality, on which Petitioners and Respondent take diametrically opposed views and could be expected to resort to hyperbole; and its content was so outlandish that no reader

could interpret it as fact.

Further, the parody appeared as one of a series of ad parodies, and was accompanied by two disclaimers, one at the bottom of the page that read "Ad Parody -- Not to be Taken Seriously," and one in the table of contents labeling the parody "Fiction; Ad and Personality Parody.".

Finally, because Petitioners are as aggressive and outspoken in their political and personal liberalism as Respondent is in his conservatism, readers could anticipate both the philosophical conflict between Petitioners and Respondent and their respective use of rhetorical hyperbole to make known their views. The audience was thus alerted three times that the parody did not convey fact.

Thus, in context, Petitioners' parody could not reasonably be understood to describe actual events in which Respondent

participated. The jury so found. Imposing financial liability on Petitioners for using rhetorical hyperbole to express an opinion that did not, and could not reasonably be understood to, convey fact disregards the absolute protection to which such comment is entitled, to the genuine detriment of editorial writers, critics and satirists -- and their audiences -- across the nation.

III. Because Petitioners' Parody is Protected Under the First Amendment, Respondent May Recover Only Upon Proof of Actual Malice.

Petitioners' parody is entitled to absolute protection under the First Amendment as a statement of opinion. Gertz, 418 U.S. 323 (1974). Should the court determine, however, that the opinion privilege does not protect the parody, it must then apply the New York Times actual malice test, which, in conjunction with Curtis Publishing Co. v.

Butts, 388 U.S. 130 (1967), prohibits public figures from recovering for allegedly defamatory statements absent proof the statements were published with knowing falsity or reckless disregard for truth. New York Times v. Sullivan, 376 U.S. 254 (1964).

The trial court correctly applied the actual malice standard to Respondent's libel claim, dismissing the claim after the jury found the parody could not be understood to convey fact and, therefore, was not libelous. The court erred, however, in refusing to apply the malice standard to Respondent's emotional distress claim.

This court has declared that statements about public officials are protected from liability unless published with actual malice. "The constitutional guarantees require, we think, a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

By prohibiting recovery absent a showing of actual malice, the New York Times rule assures authors that their statements are protected -- that they will not have to pay -- unless they publish with actual malice. Though the rule was articulated in a libel case, its language and, more importantly, its rationale, require its application to all claims arising from allegedly defamatory falsehoods.

The First Amendment is intended to preserve the free exchange of ideas essential to an informed citizenry and,

thus, to our democratic system of government. Its broad freedoms of speech and of the press were designed to prevent not merely the prior censorship of the press, but any action by which the government might inhibit free and general discussion of public matters. Curtis v. Butts 388 U.S. 130 (1967), quoting 2 Cooley, Constitutional Limitations 886 (8th ed., Carrington, 1927). Thus, the First Amendment bars subtle as well as obvious devices by which free press and speech might be stifled. N.A.A.C.P. v. Claiborne, 458 U.S. 886 (1982).

The New York Times actual malice test gives voice to this prohibition by establishing a threshold requirement for recovery for allegedly defamatory falsehoods. "Anyone claiming to be defamed must show actual malice or go remediless." New York Times v. Sullivan, 376 U.S. 254, 282 (1964), quoting Coleman

v. MacLennan, 78 Kan. 711, 723, 98 P. 281 (1908).

Permitting Respondent to recover under an emotional distress claim without proving actual malice sanctions evasion of the New York Times threshold requirement, Werner v. Times-Mirror Co., 193 Cal.App.2d 111 (1961), and endorses press restrictions through the very sort of subtle device the First Amendment is designed to prohibit. It allows Respondent to plead around a defective libel claim and recover damages where the carefully developed law of defamation permits none, thereby permitting him "to do indirectly what (he) could not do directly." Flynn v. Higham, 149 Cal.App.3d 677, 682 (1983). It imposes liability under a negligence standard that gives insufficient "breathing space" to the First Amendment. Rosenbloom v. Metromedia, 403 U.S. 29, 50 (1971).

More critically, it robs Petitioners of the protective mantle of the actual malice test and the well-established libel defense of opinion, exposing them to liability for heretofore protected statements. The ramifications of such exposure extend far beyond the confines of this case.

A large percentage of all claims for libel, particularly those arising from editorial comment, satire, political cartoon and critical comment, can be recharacterized as claims for intentional infliction of emotional distress. Because the intentional infliction tort requires only proof of negligence, liability for allegedly defamatory falsehoods will no longer hinge on a finding of actual malice. The recognized defenses of truth, opinion, fair comment and neutral reportage will be rendered ineffective. As a result, libel law as developed with re-

spect to these types of writing will be discarded, leaving vast fields of writing unprotected.

Penalizing the expression of heretofore protected ideas -- those published without actual malice -- induces "a cautious and restrictive exercise of the constitutionally guarded freedoms of speech and press." Gertz, 418 U.S. 323, 340 (1974). This condemns the press -- and with it, the public it informs -- "to an arid, desiccated recital of the bare facts." Time, Inc. v. Johnston, 448 F.2d 378, 384 (4th Cir. 1971). Fundamentally, this thwarts the First Amendment's primary goal of fostering an informed citizenry by preserving uninhibited debate on issues of public concern. For "whatever is added to the field of libel is taken away from the field of free debate." Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, cert.

denied, 317 U.S. 678 (1942).

Permitting Respondent to recover under an emotional distress claim without proving actual malice impermissibly expands the field of libel by discarding its fundamental limitations, thus exposing writers and publishers to liability for statements published in good faith within existing constitutional boundaries. This, in turn, narrows the broad freedoms protected by the First Amendment, and should not be permitted.

IV. Because Petitioners' Parody Was Not Libelous, Petitioners Should Not Be Held Liable for Torts Arising From It.

The jury expressly found that Petitioners' parody could not reasonably be understood to convey fact about Respondent. Because the parody contained no fact, it was not libelous, and was thus protected under the First Amendment. Respondent should not be permitted to re-

cover damages for the intentional infliction tort arising out of it.

Plaintiffs may not recover for torts arising out of protected statements or activities. See N.A.A.C.P. v. Claiborne, Hutchinson v. Proxmire, 579 F.2d 1027 (1978); Mine Workers v. Gibbs, 383 U.S. 715 (1965)(plaintiffs may not recover on intentional interference with business claim arising from picketing protected under First Amendment); and DeJonge v. Oregon, 299 U.S. 353 (1936)(state may not enact law that punishes constitutionally protected speech). Liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication. Reader's Digest Assn. v. Superior Court, 37 Cal.3d 244, 265 (1984). Only those acts that are not protected by the First Amendment can give rise to liability for damages. Space-Tech Industries v. Otto, 10 Med.L.Rptr. 1703

(Fla.Cir.Ct. Hillsborough County, 1984).

In the context of the instant case, this bar on recovery recognizes the incongruity of deeming a statement constitutionally protected for the purposes of libel, then saying it is outrageous enough to justify recovery for intentional infliction of emotional distress. Koch v. Goldway, 607 F.Supp. 223 (C.D.Cal. 1984).

Where tort claims arise from an allegedly defamatory statement, and that statement is deemed protected under the First Amendment, the attendant tort claims should be dismissed with the libel claim. See Polygram Records v. Superior Court, 216 Cal.Rptr. 252, 170 Cal.App.3d 543,(1985)(dismissal of libel claim dispenses with claims for trade libel, intentional infliction of emotional distress, invasion of privacy and intentional interference with business);

Reader's Digest Assn. v. Superior Court, 37 Cal.3d 244 (1984)(plaintiff's failure to show a triable issue of fact as to actual malice barred not only his defamation claim, but also his claims for false light invasion of privacy and intentional infliction of emotional distress); and Lewis v. Time, Inc., 710 F.2d 549 (E.D. Cal.(1983)(plaintiff's claims for slander, invasion of privacy and intentional infliction of emotional distress were "bound up" into claim for libel).

Respondent's claim for intentional infliction of emotional distress should have been dismissed when his libel claim was found defective. It is based on the very publication the jury determined did not convey fact, and should not be permitted independent legal existence.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,



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Counsel for amicus gratefully acknowledges the assistance of Gail Malone and Maggie Mulvihill, Legal Interns at the Reporters Committee for Freedom of the Press, in preparation of this brief.

JOINT

APPENDIX

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1278

In The
Supreme Court of the United States
October Term, 1986

HUSTLER MAGAZINE, INC. AND LARRY C. FLYNT,
Petitioners,

v.

JERRY FALWELL,
Respondent.

JOINT APPENDIX

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Petition For Certiorari Filed February 2, 1987
Certiorari Granted March 30, 1987

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Oct. 31, 1983—Plaintiff's Complaint filed in United States District Court for the Western District of Virginia.

Dec. 15, 1983—Defendants' motion to dismiss for lack of personal jurisdiction filed.

Jan. 30, 1984—Plaintiff's First Amended Complaint filed.

Feb. 2, 1984—Order entered denying motions of defendants Hustler Magazine, Inc. and Flynt Distributing Company, Inc. to dismiss for lack of personal jurisdiction, and taking under advisement motion of defendant Larry Flynt to dismiss for lack of personal jurisdiction.

Feb. 15, 1984—Plaintiff's Notice of Deposition of Larry Flynt, to take place in Lynchburg, Virginia on Feb. 28, 1984, filed.

Feb. 16, 1984—Plaintiff's motion to compel deposition, for videotape transcription and for leave to take deposition of person confined in prison filed.

Feb. 21, 1984—Defendants' Answer to Amended Complaint filed.

Feb. 21, 1984—Defendants' motion for judgment on the pleadings or, in the alternative, for summary judgment filed.

Feb. 21, 1984—Defendants' motion for protective order against deposition of Larry Flynt filed.

April 30, 1984—Order entered denying defendants' motion for judgment on the pleadings or summary judgment.

May 14, 1984—Defendants' motion to amend order denying judgment on the pleadings or summary judgment by certifying order for immediate appeal filed.

May 24, 1984—Order entered denying Defendants' motion to amend order denying judgment on the pleadings

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES—Continued

or summary judgment by certifying order for immediate appeal.

May 31, 1984—Motion of Defendant Larry Flynt for protective order against taking of deposition filed.

June 8, 1984—Order entered granting plaintiff's motion to compel discovery and denying Defendants' motion for protective order.

Nov. 1, 1984—Defendants' motion for summary judgment filed.

Nov. 1, 1984—Defendants' motion to exclude deposition of Defendant Larry Flynt filed.

Nov. 28, 1984—Order entered taking under advisement Defendants' motion for summary judgment and granting Defendants' motion to exclude deposition of Larry Flynt as to its use in evidence in chief, and taking motion under advisement as to use of deposition for impeachment purposes.

Dec. 3, 1984—Jury trial of action commenced.

Dec. 3, 1984—Order entered vacating order of November 28, 1984: motion to exclude deposition of Larry Flynt is denied; summary judgment motions are taken under advisement.

Dec. 7, 1984—Defendants' motion for directed verdict. Court granted motion as to claim of invasion of privacy, denied motion as to claim of libel, and took motion under advisement as to claim of intentional infliction of emotional distress.

Dec. 8, 1984—Court's charge to the jury, and verdict of the jury in favor of Defendant Flynt Distributing Company, Inc. on all counts, in favor of Defendants Hustler Magazine, Inc. and Larry Flynt on claim of libel, in favor of Plaintiff and against Defendants Hustler Magazine, Inc. and Larry Flynt on claim

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES—Continued

of intentional infliction of emotional distress, and awarding compensatory and punitive damages on claim of intentional infliction of emotional distress.

Dec. 18, 1984—Defendants' motion for judgment notwithstanding the verdict filed.

April 19, 1985—Order entered denying Defendants' motion for judgment notwithstanding the verdict.

April 19, 1985—Entry of judgment on the verdict.

April 22, 1985—Defendants' notice of appeal filed.

May 8, 1985—Plaintiff's notice of cross-appeal filed.

August 5, 1986—Opinion of the United States Court of Appeals for the Fourth Circuit, affirming judgment of the District Court, filed.

November 4, 1986—Order of the United States Court of Appeals for the Fourth Circuit, *in banc*, denying petition for rehearing, with dissenting opinions, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

REVEREND JERRY FALWELL, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 83-0155-L
LARRY C. FLYNT, HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,	)	COMPLAINT
	)	JURY TRIAL DEMANDED
	)	(Filed Oct. 3, 1983)
Defendants.	)	

Reverend Jerry Falwell, plaintiff herein, by his attorneys, respectfully represents unto this Court as follows:

THE PARTIES

1. Plaintiff is a fundamentalist minister and a citizen of the State of Virginia, whose activities are centered in Lynchburg, Virginia.

2. Defendant Larry C. Flynt is, upon information and belief, a citizen of the State of California. Upon information and belief, Flynt is the president of both Hustler Magazine, Inc. and Flynt Distributing Company, Inc.

3. Defendant Hustler Magazine, Inc. ("Hustler"), is, upon information and belief, a corporation organized

under the laws of the State of California, with its principal place of business at 2029 Century Park East, Suite 3800, Los Angeles, California 90067. Hustler is the publisher of *HUSTLER* magazine, a monthly publication of general circulation which is distributed and read widely throughout the United States and elsewhere.

4. Defendant Flynt Distributing Company, Inc. ("FDC") is, upon information and belief, a corporation organized under the laws of the State of California, with its principal place of business at 2029 Century Park East, Suite 3800, Los Angeles, California 90067. FDC is the national distributor for *Hustler* magazine.

JURISDICTION

5. This Court has jurisdiction pursuant to 28 U.S.C. Section 1332 in that there is diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

THE FACTS

6. In the November 1983, Vol. 10, No. 5, issue of *HUSTLER* magazine, defendants Flynt and Hustler wrote and published or caused to be written and published on the inside front cover of the magazine statements of and concerning plaintiff accompanied by a photograph of the plaintiff. Defendant FDC distributed the November 1983 issue of *HUSTLER* magazine throughout the United States and elsewhere.

7. The statements and photograph of and concerning plaintiff were in the form of an advertisement for Campari liquor. A copy of the cover and inside front

cover of the November 1983 issue of *HUSTLER* magazine is annexed hereto as Exhibit A and incorporated by reference herein.

8. The text of the statements about plaintiff appears as follows in an interview format in the advertisement under the bold-faced caption "Jerry Falwell Talks About His First Time":

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and sode—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100.00 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mon passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure - - - lots of times. But not in the outhouse. Between Mom and the shit, the flies were to much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh yeah, I always get sloshed be- I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you.

COUNT ONE

(Invasion of Privacy)

9. Plaintiff repears and realleges each and every allegation set forth in paragraphs 1-8 above as if fully set forth herein.

10. Defendants have knowingly and without plaintiff's consent, written or otherwise, in their business and for purposes of advertisement or trade, have used within the State of Virginia and elsewhere the name and photograph of plaintiff, a living person; plaintiff's photograph and name have been prominently and wrongfully exhibited on the inside front cover of the November 1983 issue of *Hustler* magazine in violation of Virginia Code Section 8.01-40.

11. Defendants have deliberately, knowingly and unlawfully used, displayed, distributed and published the name and photograph of plaintiff, not in connection with an item of news or the dissemination of newsworthy in-

formation, but rather accompanied by fictional and libelous textual material, merely to attract the attention of the public for the purpose of enhancing the sales of *HUSTLER* magazine.

12. Defendant's unlawful and wrongful use, display, publication and distribution of plaintiff's name and photograph in the November 1983 issue of *HUSTLER* magazine have caused plaintiff great mental distress and anguish, humiliation, exposure to public ridicule, hatred and contempt, and by reason thereof, plaintiff has sustained, is now sustaining and will continue to sustain intense mental suffering and distress which have greatly interfered with his personal and professional life, including his reputation and effectiveness as a fundamentalist minister, and otherwise damaged plaintiff, in the amount of $5,000,000.

13. Defendants, and each of them, knew or should have known prior to publication and distribution of the November 1983 issue of *HUSTLER* magazine that they were using plaintiff's name and photograph for purposes of advertising or trade without his written consent, rendering defendants, and each of them, liable to plaintiff for punitive damages in the amount of $10,000,000.

COUNT TWO

(Libel)

14. Plaintiff repears and realleges each and every allegation set forth in paragraphs 1-8 above as if fully set forth herein.

15. The foregoing publication of and concerning plaintiff, together with its inferences and innuendos, is

false and defamatory in that it was meant by defendants, and is intended to mean, and was and is understood by readers of *HUSTLER* magazine as meaning, among other things, that plaintiff commits illegal, immoral and reprehensible acts, that he is an alcoholic and that he is insincere and hypocritical in his work as a fundamentalist minister.

16. Such defamation of plaintiff is libelous *per se* in that it imputes to plaintiff a criminal offense involving moral turpitude, imputes to plaintiff unfitness to perform the duties of his office as a fundamentalist minister and want of integrity in the discharge of such duties, and prejudices plaintiff in his calling as a fundamentalist minister.

17. The purpose and intent of the foregoing publication was and is to expose plaintiff to public hatred, contempt, aversion and disgrace and to induce an evil and unsavory opinion of him in the minds of the community, and tends to disparage and damage plaintiff in his office, profession or trade. Plaintiff's effectiveness as a fundamentalist minister is based on trust and confidence in his morality, honesty and sincerity, which trust and confidence is directly threatened by defendants' accusations of criminality, immorality and insincerity.

18. The foregoing publication was falsely and maliciously published and/or distributed by the defendants of and concerning plaintiff without plaintiff's consent. At the time of such publication and distribution, defendants knew or should have known, that the matters asserted of and concerning plaintiff were untrue and libelous, or made such assertions and statements in reckless disregard of their truth, and in publishing and distributing such false

and defamatory matters, the defendants were actuated by actual malice and wrongfully, recklessly and willfully intended by said publication to injury plaintiff in complete disregard of his reputation and good name.

19. By reason of the foregoing, plaintiff has been injured in his good name, has suffered mental anguish and distress, has been exposed to public hatred, contempt, aversion, disgrace and other unsavory public opinion, has been injured in the esteem in which he has been held as an individual, has suffered a diminution of his respectability in his personal and business dealings and his reputation and effectiveness as a fundamentalist minister, all to his damage in the amount of $5,000,000. compensatory damages and $10,000,000. punitive damages.

COUNT THREE

(Intentional Inflect of Emotional Distress)

20. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-8 above as if fully set forth herein.

21. In publishing and distributing the foregoing publication, defendants acted willfully, intentionally, recklessly and maliciously and their conduct was outrageous, extreme and intolerable in that it offends generally accepted standards of decency and morality.

22. The aforesaid wrongful conduct on the part of the defendants amounted to an intentional infliction of mental suffering and severe emotional distress upon the plaintiff. In particular and without limiting the generality of the foregoing the references to plaintiff and use of his

name and photograph in the inside front cover of the November 1983 issue of *HUSTLER* magazine, accusing plaintiff of illegal, immoral and reprehensible acts, considered together in the context of the other textual materials, photographs and cartoons contained in said magazine, caused plaintiff severe emotional anguish and distress.

23. By reason of the foregoing, plaintiff has been injured in the amount of $5,000,000. in compensatory damages and is also entitled to $10,000,000 in punitive damages.

WHEREFORE, Plaintiff demands judgment against the defendants, jointly and severally, as follows:

(a) On Count One, $5,000,000. compensatory damages and $10,000,000. punitive damages;

(b) On Count Two, $5,000,000. compensatory damages and $10,000,000. punitive damages;

(c) On Count Three, $5,000,000. compensatory damages and $10,000,000. punitive damages;

(d) On all counts, the costs and disbursements of this action, reasonable attorney's fees and such other, further and different relief as to the Court seems just and proper.

Respectfully submitted,

REVEREND JERRY FALWELL

By /s/ Howard W. Rhodes, Jr.
Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

REVERAND JERRY FALWELL,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 83-0155-6
vs.	)	
	)	AMENDED
LARRY C. FLYNT, HUSTLER	)	COMPLAINT
MAGAZINE, INC. and FLYNT	)	
DISTRIBUTING COMPANY,	)	JURY TRIAL
INC.,	)	DEMANDED
	)	
Defendants.	)	

Reverand Jerry Falwell, plaintiff herein, by his attorneys, respectfully represents unto this Court as follows:

THE PARTIES

1. Plaintiff is a fundamentalist minister and a citizen of the State of Virginia, whose activities are centered in Lynchburg, Virginia.

2. Defendant Larry C. Flynt is, upon information and belief, a citizen of the State of California. Upon information and belief, Flynt is the president of both Hustler Magazine, Inc. and Flynt Distributing Company, Inc., and a publisher of *HUSTLER* magazine, a monthly publication of general circulation which is distributed and read widely throughout the United States and elsewhere.

3. Defendant Hustler Magazine, Inc. ("Hustler") is, upon information and belief, a corporation organized under the laws of the State of California, with its principal place of business at 2029 Century Park East, Suite 3800, Los

Angeles, California 90067, and a publisher of *HUSTLER* magazine.

4. Defendant Flynt Distributing Company, Inc. ("FDC") is, upon information and belief, a corporation organized under the laws of the State of California, with its principal place of business at 2029 Century Park East, Suite 3800, Los Angeles, California 90067. FDC is the national distributor for *HUSTLER* magazine.

JURISDICTION

5. This Court has jurisdiction pursuant to 28 U.S.C. Section 1332 in that there is diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00

COUNT ONE

(Invasion of Privacy)

6. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-5 above as if fully set forth herein.

7. In the November 1983, Vol. 10, No. 5, issue of *HUSTLER* magazine, defendants Flynt and Hustler wrote and published or caused to be written and published on the inside front cover of the magazine statements of and concerning plaintiff accompanied by a photograph of the plaintiff. Defendant FDC distributed the November 1983 issue of *HUSTLER* magazine throughout the United States and elsewhere.

8. The statements and photograph of and concerning plaintiff were in the form of an advertisement for Compari liquor. A copy of the cover and inside front cover of the

November 1983 issue of *HUSTLER* magazine is annexed hereto as Exhibit A and incorporated by reference herein.

9. The text of the statements about plaintiff appears as follows in an interview format in the advertisement under the bold-faced caption "Jerry Falwell Talks About His First Time":

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured "What the hell!"

INTERVIEWER: But your mom? Isn't that bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100.00 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure - - - lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We mean the Campari.

FALWELL: Oh yeah, I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you?

10. Defendants have knowingly and without plaintiff's consent, written or otherwise, in their business and for purposes of advertisement or trade, used within the Commonwealth of Virginia and elsewhere the name and photograph of plaintiff, a living person; plaintiff's photograph and name have been prominently and wrongfully exhibited on the inside front cover of the November 1983 issue of *HUSTLER* magazine in violation of Virginia Code Section 8.01-40.

11. Defendants have deliberately, knowingly and unlawfully used, displayed, distributed and published the name and photograph of plaintiff, not in connection with an item of news or the dissemination of newsworthy information, but rather accompanied by fictional and libelous textual material, merely to attract the attention of the public for the purpose of enhancing the sales of *HUSTLER* magazine.

12. Defendants' unlawful and wrongful use, display, publication and distribution of plaintiff's name and photograph in the November 1983 issue of *HUSTLER* magazine have caused plaintiff great mental distress and anguish, humiliation, exposure to public ridicule, hatred and

contempt, and by reason thereof, plaintiff has sustained, is now sustaining and will continue to sustain intense mental suffering and distress which have greatly interfered with his personal and professional life, including his reputation and effectiveness as a fundamentalist minister, and otherwise damaged plaintiff, in the amount of $5,000,000.

13. Defendants, and each of them, knew or should have known prior to publication and distribution of the November 1983 issue of *HUSTLER* magazine, that they were using plaintiff's name and photograph for purposes of advertising or trade without his written consent, rendering defendants, and each of them, liable to plaintiff for punitive damages in the amount of $10,000,000.

COUNT TWO

(Libel)

14. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-9 above as if fully set forth herein.

15. The foregoing publication of and concerning plaintiff, together with its inferences and innuendos, is false and defamatory in that it was meant by defendants, and is intended to mean, and was and is understood by readers of *HUSTLER* magazine as meaning, among other things, that plaintiff comits illegal, immoral and reprehensible acts, that he is an alcoholic and that he is insincere and hypocritical in his work as a fundamentalist minister.

16. Such defamation of plaintiff is libelous *per se* in that it imputes to plaintiff a criminal offense involving moral turpitude, imputes to plaintiff unfitness to perform the duties of his office as a fundamentalist minister and

want of integrity in the discharge of such duties, and prejudices plaintiff in his calling as a fundamentalist minister.

17. The purpose and intent of the foregoing publication was and is to expose plaintiff to public hatred, contempt, aversion and disgrace and to induce an evil and unsavory opinion of him in the minds of the community, and tends to disparage and damage plaintiff in his office, profession or trade. Plaintiff's effectiveness as a fundamentalist minister is based on trust and confidence in his morality, honesty and sincerity, which trust and confidence is directly threatened by defendants' accusations of criminality, immorality and insincerity.

18. The foregoing publication was falsely and maliciously published and/or distributed by the defendants of and concerning the plaintiff without plaintiff's consent. At the time of such publication and distribution, defendants knew or should have known, that the matters asserted of and concerning plaintiff were untrue and libelous, or made such assertions and statements in reckless disregard of their truth, and in publishing and distributing such false and defamatory matters, the defendants were actuated by actual malice and wrongfully, recklessly and willfully intended by said publication to injure plaintiff in complete disregard of his reputation and good name.

19. By reason of the foregoing, plaintiff has been injured in his good name, has suffered mental anguish and distress, has been exposed to public hatred, contempt, aversion, disgrace and other unsavory public opinion, has been injured in the esteem in which he has been held as an individual, has suffered a diminution of his respectability

in his personal and business dealings and his reputation and effectiveness as a fundamentalist minister, all to his damage in the amount of $5,000,000 compensatory damages and $10,000,000, punitive damages.

COUNT THREE

(Intentional Infliction of Emotional Distress)

20. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-9 above as if fully set forth herein.

21. In publishing and distributing the foregoing publication, defendants acted willfully, intentionally, recklessly and maliciously and their conduct was outrageous, extreme and intolerable in that it offends generally accepted standards of decency and morality.

22. The aforesaid wrongful conduct on the part of the defendants amounted to an intentional infliction of mental suffering and severe emotional distress upon the plaintiff. In particular and without limiting the generality of the foregoing, the references to plaintiff and use of his name and photograph on the inside front cover of the November 1983 issue of *HUSTLER* magazine, accusing plaintiff of illegal, immoral and reprehensible acts, considered together in the context of the other textual materials, photographs and cartoons contained in said magazine, caused plaintiff severe emotional anguish and distress.

23. By reason of the foregoing, plaintiff has been injured in the amount of $5,000,000 in compensatory damages and is also entitled to $10,000,000 in punitive damages.

COUNT FOUR

(Invasion of Privacy)

24. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-9 above as if fully set forth herein.

25. In the March 1984, Vol. 10, No. 9, issue of *HUSTLER* magazine, defendants Flynt and Hustler republished the advertisement of and concerning the plaintiff which had earlier appeared in the November 1983 issue of *HUSTLER* magazine. Defendant FDC distributed the March 1984 issue of *HUSTLER* magazine throughout the United States and elsewhere. A copy of the cover and page 20 of the March 1984 issue of *HUSTLER* magazine is annexed hereto as Exhibit B and incorporated by reference herein.

26. Defendants have knowingly and without plaintiff's consent, written or otherwise, in their business and for purposes of advertisement or trade, used within the Commonwealth of Virginia and elsewhere the name and photograph of plaintiff, a living person; plaintiff's photograph and name have been prominently and wrongfully exhibited at page 20 of the March 1984 issue of *HUSTLER* magazine in violation of Virginia Code Section 8.01-40.

27. Defendants have deliberately, knowingly and unlawfully used, displayed, distributed and published the name and photograph of plaintiff, not in connection with an item of news or the dissemination of newsworthy information, but rather accompanied by fictional and libelous textual material, merely to attract the attention of the public for the purpose of enhancing the sales of *HUSTLER* magazine.

28. Defendants' unlawful and wrongful use, display, publication and distribution of plaintiff's name and photograph in the November 1983 issue of *HUSTLER* magazine have caused plaintiff great mental distress and anguish, humiliation, exposure to public ridicule, hatred and contempt, and by reason thereof, plaintiff has sustained, is now sustaining and will continue to sustain intense mental suffering and distress which have greatly interfered with his personal and professional life, including his reputation and effectiveness as a fundamentalist minister, and otherwise damaged plaintiff, in the amount of $5,000,000.

29. Defendants, and each of them, knew or should have known prior to publication and distribution of the March 1984 issue of *HUSTLER* magazine that they were using plaintiff's name and photograph for purposes of advertising or trade without his written consent, rendering defendants, and each of them, liable to plaintiff for punitive damages in the amount of $20,000,000.

COUNT FIVE

(Libel)

30. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-5 and 25 above as if fully set forth herein.

31. The foregoing publication of and concerning plaintiff, together with its inferences and innuendos, is false and defamatory in that it was meant by defendants, and is intended to mean, and was and is understood by readers of *HUSTLER* magazine as meaning, among other things, that plaintiff comits illegal, immoral and reprehensible

acts, that he is an alcoholic and that he is insincere and hypocritical in his work as a fundamentalist minister.

32. Such defamation of plaintiff is libelous *per se* in that it imputes to plaintiff a criminal offense involving moral turpitude, imputes to plaintiff unfitness to perform the duties of his office as a fundamentalist minister and want of integrity in the discharge of such duties, and prejudices plaintiff in his calling as a fundamentalist minister.

33. The purpose and intent of the foregoing publication was and is to expose plaintiff to public hatred, contempt, aversion and disgrace and to induce an evil and unsavory opinion of him in the minds of the community, and tends to disparage and damage plaintiff in his office, profession or trade. Plaintiff's effectiveness as a fundamentalist minister is based on trust and confidence in his morality, honesty and sincerity, which trust and confidence is directly threatened by defendants' accusations of criminality, immorality and insincerity.

34. The foregoing publication was falsely and maliciously published and/or distributed by the defendants or and concerning the plaintiff without plaintiff's consent. At the time of such publication and distribution, defendants knew or should have known, that the matters asserted of and concerning plaintiff were untrue and libelous, or made such assertions and statements in reckless disregard of their truth, and in publishing and distributing such false and defamatory matters, the defendants were actuated by actual malice and wrongfully, recklessly and willfully intended by said publication to injure plaintiff in complete disregard of his reputation and good name.

35. By reason of the foregoing, plaintiff has been injured in his good name, has suffered mental anguish and distress, has been exposed to public hatred, contempt, aversion, disgrace and other unsavory public opinion, has been injured in the esteem in which he has been held as an individual, has suffered a diminution of his respectability in his personal and business dealings and his reputation and effectiveness as a fundamentalist minister, all to his damage in the amount of $5,000,000 compensatory damages and $20,000,000, punitive damages.

COUNT SIX

(Intentional Infliction of Emotional Distress)

36. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-5 and 25 above as if fully set forth herein.

37. In publishing and distributing the foregoing publication, defendants acted willfully, intentionally, recklessly and maliciously and their conduct was outrageous, extreme and intolerable in that it offends generally accepted standards of decency and morality.

38. The aforesaid wrongful conduct on the part of the defendants amounted to an intentional infliction of mental suffering and severe emotional distress upon the plaintiff. In particular and without limiting the generality of the foregoing, the references to plaintiff and use of his name and photograph at page 20 of the March 1984 issue of *HUSTLER* magazine, accusing plaintiff of illegal, immoral and reprehensible acts, considered together in the context of the other textual materials, photographs and cartoons contained in said magazine, caused plaintiff severe emotional anguish and distress.

39. By reason of the foregoing, plaintiff has been injured in the amount of $5,000,000 in compensatory damages and is also entitled to $20,000,000 in punitive damages.

WHEREFORE, Plaintiff demands judgment against the defendants, jointly and severally, as follows:

(a) On Count One, $5,000,000 compensatory damages and $10,000,000 punitive damages;

(b) On Count Two, $5,000,000 compensatory damages and $10,000,000 punitive damages;

(c) On Count Three, $5,000,000 compensatory damages and $10,000,000 punitive damages;

(d) On Count Four, $5,000,000 compensatory damages and $20,000,000 punitive damages;

(e) On Count Five, $5,000,000 compensatory damages and $20,000,000 punitive damages;

(f) On Count Six, $5,000,000 compensatory damages and $20,000,000 punitive damages; and

(g) On all counts, the costs and disbursements of this action, reasonable attorneys' fees and such other, further and different relief as to the Court seems just and proper.

Respectfully submitted,

REVEREND JERRY FALWELL

By /s/ Howard W. Rhodes Jr.
Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

[Caption Omitted in Printing]

ANSWER TO AMENDED COMPLAINT

Defendants Hustler Magazine, Inc., Flynt Distributing Company, Inc., and Larry C. Flynt answer the Amended Complaint on file herein as follows:

1. Defendants have no information or belief sufficient to enable them to answer the allegations contained in paragraph 1 of the Amended Complaint, and basing their denial upon that ground, generally and specifically deny each and every allegation contained therein.

2. Defendants admit that defendant Larry C. Flynt is a citizen of the State of California. Except as so admitted, defendants generally and specifically deny each and every allegation contained in paragraph 2 of the complaint.

3. Defendants admit the allegations of paragraph 3 of the Amended Complaint.

4. Defendants admit the allegations of paragraph 4 of the Amended Complaint.

5. Defendants generally and specifically deny each and every allegation contained in paragraph 5 of the Amended Complaint.

6. In answer to paragraph 6 of the Amended Complaint, defendants refer to paragraphs 1 through 5 of this Answer, and by such reference reallege each and every allegation contained therein as though again set forth in full.

7. Defendants admit that in the November 1983, Vol. 10, No. 5, issue of *Hustler* Magazine, defendant Hustler Magazine, Inc. published on the inside front cover an ad and personality parody accompanied by a photograph of plaintiff, and that defendant Flynt Distributing Company, Inc. distributed said issue throughout the United States and elsewhere. Except as so admitted, defendants generally and specifically deny each and every allegation of paragraph 7 of the Amended Complaint.

8. Defendants admit that the statements and photograph contained on the inside front cover of said issue of Hustler Magazine were in the form of a parody of advertisements for Campari liquor. Defendants further admit that a copy of the cover and inside front cover of the November 1983 issue of Hustler Magazine is annexed to the Amended Complaint as Exhibit "A". Except as so admitted, defendants generally and specifically deny each and every allegation in paragraph 8 of the Amended Complaint.

9. Defendants admit that the statements reproduced in paragraph 9 of the Amended Complaint are a portion of the statements which appear on the inside front cover of the November 1983 issue of *Hustler* Magazine. Except as so admitted, defendants generally and specifically deny each and every allegation of paragraph 9 of the Amended Complaint.

10. Defendants generally and specifically deny each and every allegation of paragraph 10 of the Amended Complaint.

11. Defendants generally and specifically deny each and every allegation of paragraph 11 of the Amended Complaint.

12. Defendants generally and specifically deny each and every allegation of paragraph 12 of the Amended Complaint, and further allege that plaintiff has not suffered damages in the amount of $5,000,000, or damages in any other amount.

13. Defendants generally and specifically deny each and every allegation of paragraph 13 of the Amended Complaint, and further allege that plaintiff is not entitled to punitive damages in the amount of $10,000,000, or any other amount.

14. In answer to paragraph 14 of the Amended Complaint, defendants refer to paragraphs 1 through 9 of this Answer, and by such reference reallege each and every allegation contained therein as though again set forth in full.

15. Defendants deny each and every allegation of paragraph 15 of the Amended Complaint.

16. Defendants deny each and every allegation of paragraph 16 of the Amended Complaint.

17. Defendants deny each and every allegation of paragraph 17 of the Amended Complaint.

18. Defendants deny each and every allegation of paragraph 18 of the Amended Complaint.

19. Defendants deny each and every allegation of paragraph 19 of the Amended Complaint, and further allege that plaintiff has not been damaged in the amount of $5,000,000 compensatory damages, or damages in any other amount. Defendants further allege that plaintiff is not entitled to punitive damages in the amount of $10,000,000, or any other amount.

20. In answer to paragraph 20 of the Amended Complaint, defendants refer to paragraphs 1 through 9 of the Answer, and by such reference reallege each and every allegation contained therein as though set forth in full.

21. Defendants deny each and every allegation of paragraph 21 of the Amended Complaint.

22. Defendants deny each and every allegation of paragraph 22 of the Amended Complaint.

23. Defendants deny each and every allegation of paragraph 23 of the Amended Complaint, and further allege that plaintiff has not been injured in the amount of $5,000,000 in compensatory damages, or in any amount. Defendants further allege that plaintiff is not entitled to $10,000,000, or any amount, in punitive damages.

24. In answer to paragraph 24 of the Amended Complaint, defendants refer to paragraphs 1 through 9 of this Answer, and by such reference reallege each and every allegation contained therein as though again set forth in full.

25. Defendants admit that in the March 1984, Vol. 10, no. 9, issue of *Hustler* Magazine, defendant Hustler Magazine, Inc., republished the ad and personality parody which had appeared in the November 1983 issue of *Hustler* Magazine. Defendants further admit that defendant Flynt Distributing Company, Inc. distributed the March 1984 issue of *Hustler* Magazine throughout the United States and elsewhere. Defendants further admit that a copy of the cover and page 20 of the March 1984 issue of *Hustler* Magazine is annexed to the Amended Complaint as Exhibit "B". Except as so admitted, defendants deny each and every allegation contained in paragraph 25 of the Amended Complaint.

26. Defendants deny each and every allegation of paragraph 26 of the Amended Complaint.

27. Defendants deny each and every allegation of paragraph 27 of the Amended Complaint.

28. Defendants generally and specifically deny each and every allegation of paragraph 28 of the Amended Complaint, and further allege that plaintiff has not suffered damages in the amount of $5,000,000, or damages in any other amount.

29. Defendants generally and specifically deny each and every allegation of paragraph 29 of the Amended Complaint, and further allege that plaintiff is not entitled to punitive damages in the amount of $20,000,000, or any other amount.

30. In answer to paragraph 30 of the Amended Complaint, defendants refer to paragraph 1 through 5 and 25 of this Answer, and by such reference reallege each and every allegation contained therein as though again set forth in full.

31. Defendants deny each and every allegation of paragraph 31 of the Amended Complaint.

32. Defendants deny each and every allegation of paragraph 32 of the Amended Complaint.

33. Defendants deny each and every allegation of paragraph 33 of the Amended Complaint.

34. Defendants deny each and every allegation of paragraph 34 of the Amended Complaint.

35. Defendants deny each and every allegation of paragraph 35 of the Amended Complaint, and further allege that plaintiff has not been damaged in the amount of $20,000,000 compensatory damages, or damages in any other amount. Defendants further allege that plaintiff is not entitled to punitive damages in the amount of $20,000,000, or any other amount.

36. In answer to paragraph 36 of the Amended Complaint, defendants refer to paragraphs 1 through 5 and 25 of this Answer, and by such reference reallege each and every allegation contained therein as though again set forth in full.

37. Defendants deny each and every allegation of paragraph 37 of the Amended Complaint.

38. Defendants deny each and every allegation of paragraph 38 of the Amended Complaint.

39. Defendants deny each and every allegation of paragraph 39 of the Amended Complaint, and further allege that plaintiff has not been injured in the amount of $5,000,00 in compensatory damages, or in any amount. Defendants further allege that plaintiff is not entitled to $20,000,000, or any amount, in punitive damages.

FIRST AFFIRMATIVE DEFENSE

Count One of the Amended Complaint, for Invasion of Privacy, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Count Two of the Amended Complaint, for Libel, fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Count Three of the Amended Complaint, for Intentional Infliction of Emotional Distress, fails to state a claim upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

Count Four of the Amended Complaint, for Invasion of Privacy, fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

Count Five of the Amended Complaint, for Libel, fails to state a claim upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

Count Six of the Amended Complaint, for Intentional Infliction of Emotional Distress, fails to state a claim upon which relief can be granted.

SEVENTH AFFIRMATIVE DEFENSE

The ad and personality parody published in *Hustler* Magazine is and was protected First Amendment expression.

EIGHTH AFFIRMATIVE DEFENSE

In publishing an ad and personality parady using the name and photograph of plaintiff, a public figure, defendants did not act with knowledge of falsity or reckless disregard for the truth.

NINTH AFFIRMATIVE DEFENSE

The ad and personality parody was obviously a parody which was not susceptible of being interpreted as an allegation of any facts regarding plaintiff, and was clearly labeled as such.

TENTH AFFIRMATIVE DEFENSE

Plaintiff by his conduct is estopped to assert his causes of action.

ELEVENTH AFFIRMATIVE DEFENSE

The publication complained of was privileged as a fair comment upon a matter of public interest.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff, by his conduct, has aggravated his damages, if any.

THIRTEENTH AFFIRMATIVE DEFENSE

The statements allegedly made by defendants, if any, were not made of or concerning the plaintiff.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff, a public figure, has surrendered any right of privacy which he might otherwise have.

WHEREFORE, defendants pray judgment against plaintiff as follows:

1. That plaintiff take nothing by his complaint;
2. for costs of suit herein;
3. for reasonable attorneys fees; and
4. for such other and further relief as the court deems just and proper.

Respectfully submitted,

HUSTLER MAGAZINE, INC.
FLYNT DISTRIBUTING COMPANY, INC.
LARRY C. FLYNT

By /s/ David O. Carson
Of Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

REVEREND JERRY FALWELL, Plaintiff,	)	CIVIL ACTION NO. 83-0155-L
v.	)	MEMORANDUM OPINION
LARRY FLYNT, HUSTLER MAGAZINE, INC., and FLYNT DISTRIBUTING COMPANY, INC., Defendants.	)	By: James C. Turk Chief U.S. District Judge

This case is before the court on various pre-trial motions filed by the defendants, Larry Flynt, Hustler Magazine, Inc., and Flynt Distributing Company, Inc.[1] Jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The parties have submitted briefs and the matters are ripe for a decision by this court.

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II.

The defendants' second motion is to exclude the June 15, 1984 deposition of Larry Flynt. The motion was accompanied by declarations of two psychiatrists who examined Flynt, and by excerpts from the deposition itself.

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1. One of the defendants' pre-trial motions, a Motion to Transfer, has already been ruled on by this court and an order has already been entered.

The psychiatrists state that Flynt's physical[2] and mental[3] disorders prompted him to give irrational responses without regard to their truth. Flynt's mental illness "precluded his giving a competent truthful statement at his deposition just as his spinal cord being severed precluded his standing up or walking."[4] Likewise, Flynt was not competent as a witness in that his condition impaired his ability to remember and recount events.

The findings of the psychiatrists are clearly supported by the deposition transcript. For example, Flynt identified himself as "Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh." (Dep. Trans. p. 22) He refused to take the oath. (Dep. Trans. p. 21) He testified that the ad parody the subject of this lawsuit was composed by, among others, Billy Idol and Yoko Ono. (Dep. Trans. p. 112) Such responses are neither truthful, responsive, nor rational.

As Flynt could not comprehend the obligation of the oath, and could not give a correct account of events, his deposition of June 15, 1984 must be excluded from the case in chief. *See Supreme Court in District of Columbia v. Ames*, 107 U.S. 519 (1882). The motion is taken under advisement as to the use of the deposition for impeachment purposes and will be addressed at such time as the issue may arise during the trial.

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2. Flynt is a paraplegic and, at the time of the deposition, was suffering from painful bedsores.

3. One psychiatrist described Flynt's mental illness as "manic-grandiosity" which caused him to act "as though he believed himself immune from and invulnerable to any believed threat, and in particular to the judicial system and deposition process."

4. Declaration of Dr. Saul Niedorf.

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The Clerk of Court is directed to send certified copies of this Memorandum Opinion to all counsel of record.

DATED: This 28th day of November, 1984.

/s/ James C. Turk
Chief U. S. District Judge

A True Copy TESTE: Joyce F. Witt, Clerk

By: /s/ R. Craft
Deputy Clerk

TRANSCRIPT OF PROCEEDINGS

TRIAL TESTIMONY

TESTIMONY OF JERRY FALWELL

December 4, 1984

[Volume 2, page 10 of trial transcript (2/10)*]

JERRY FALWELL, the Plaintiff, was called as a witness, and after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

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[2/16]

Q. As the years have gone on, Mr. Falwell, have you devoted the entirety of your professional working life to the development of your ministerial activities starting at the Thomas Road Baptist Church?

A. There is no time left for avocations of past-times. I stopped golfing twenty-five (25) years ago, not because I don't like it; you just can't do it at 3:00 in the morning.

Q. Approximately how many hours a day do you work on your ministries?

A. I usually arise at 5:45 in the morning, wherever I happen to be, and I usually go to bed at 12:00 or midnight or 1:00 a.m.

Q. Is that a regime that you have followed consistently for all of your professional working life?

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* Citations to the transcript hereinafter will be in the following form: volume/page.

A. It is, and the past twelve (12) months, a typical year, we have traveled four hundred thousand (400,000) miles speaking over twelve hundred (1,200) times.

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[2/44-45]

Q. Would you tell His Honor and the members of this jury what your personal reaction was when you read this ad in Exhibit One over for the first time?

A. I think I have never been as angry as I was at that moment. My first impression was that Campari had purchased an ad in the magazine because I had seen a similar ad in decent magazines earlier, and my first thought was to get on the phone to Campari.

Our in-house attorney and I talked it over. My anger became a more rational and deep hurt. I somehow felt that in all of my life I had never believed that human beings could do something like this. I really felt like weeping. I am not a deeply emotional person; I don't show it. I think I felt like weeping.

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[2/57-58]

Q. Mr. Falwell, are your [sic] familiar with the three (3) letters that I have just handed up to you and which have been presently marked as Exhibits 2-A, B and C for identification respectively?

A. Yes.

Q. Would you tell us what they are?

A. Exhibit A and Exhibit B are actually one letter sent on the same day to different segments of the mailing file of Moral Majority.

Q. What was the difference between the segments to which they were addressed.

A. Twenty-six thousand (26,000) of the people, approximately, who received what is called here Exhibit A are the major contributors to Moral Majority, and the four hundred and sixty thousand (460,000), approximately, which are listed here as Exhibit B are to the rank and file grass-root membership but who would not be major contributors.

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[2/58]

Q. Now, let me address for the moment Exhibit 2-A and 2-B which was sent, as you say, by the Moral Majority. Can you tell us, please, I think you have indicated there was approximately five hundred thousand (500,000) of these sent out. First, with respect to the twenty-six thousand (26,000) that went to your major donors, within the first thirty (30) days in response to those letters, how much money was received by the Moral Majority?

A. Forty-four thousand, nine hundred and thirty-one dollars and ninety-one cents ($44,931.91).

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[2/60]

Q. With regard to the larger number that went to the grassroot supporters of the Moral Majority, which I think you said was four hundred and sixty thousand and some odd people, within the first thirty (30) days how much revenue was received?

A. Seventy-seven thousand, eight hundred and twenty-four ($77,824).

• • •

[2/65-66]

Q. Now, within thirty (30) days what was the total amount of money received by the Old Time Gospel Hour in response to these three (3) types of mailings that went out on November 18, 1983?

A. Six hundred, twenty-three thousand, two hundred and sixty-eight dollars and eighty-one cents ($623,268.81).

Q. Subsequently, was additional money received beyond thirty (30) days?

A. With an additional thirty (30) days, another forty-nine thousand, one hundred and eighty dollars and sixty-nine cents ($49,180.69) received.

Q. Making the total receipts for the Old Time Gospel Hour in response to the survival fund solicitation for the letters of November 18, 1983, a total of how much?

A. Six hundred, seventy-two thousand, four hundred, forty-nine dollars, fifty cents ($672,449.50).

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[2/69-71]

Q. On Page 20 the same ad that was published in the November issue appears again. Did you learn that this re-publication of the ad on which you were suing in this lawsuit had again been inserted into the pages of Hustler Magazine?

A I did.

Q. When you learned of that, Mr. Falwell, what was your reaction or response or feeling?

A. It was a re-opening of an already very deep wound of personal anguish and hurt and suffering, such as nothing in my adult life I ever recall before.

Q. Did you feel debilitated by it?

A. I did, indeed.

Q. Now, you have mentioned what your reaction was within the first days after first seeing the November '83 issue. Had those feelings that you have earlier described to us gone away between October or November of '83 and February or March of '84?

A. They had not.

Q. To what extent did they continue to affect you in your daily living, thinking and feeling?

A. I have never been to a psychiatrist or psychologist in my life for personal help. I am not sure but what I feel that as a Christian and a minister—I am not sure it would not be wrong for me to do it. I just have a personal feeling that as a Christian I should be able to take my personal burdens to the Lord. I did not cut my schedule back; I did not stop anything I was doing, but I can tell you it has created the most difficult year of performance, physically, mentally, emotionally, in all of my life. Those who work near me can tell you that my ability to concentrate and focus on the job at hand has been greatly, greatly damaged.

MR. ISAACMAN: Your Honor, I am going to object to his testifying as to what other people could tell; it is hearsay.

MR. GRUTMAN: I agree.

THE COURT: All right.

DIRECT EXAMINATION CONTINUED:

BY MR. GRUTMAN:

Q. Mr. Fallwell, just tell us: As you know yourself, was there any change or difference in your ability to focus on the tasks and responsibilities that you were fulfilling in the year that has passed?

A. A very severe difference.

Q. To what do you attribute it?

A. To the hurt inflicted upon me personally and the defiling of my reputation; of the hurt inflicted upon me because of the embarrassment my family has gone through repeatedly; the injury and emotional anguish inflicted upon me due to the besmirching and defiling of my dear mother's memory; and my feeling of personal frustration because it not only appeared once, now it has appeared the second time, and according to Mr. Flynt's own testimony, he will do it whenever and as ever he pleases.

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[2/77]

Q. Mr. Falwell, as a man active in public life and who has taken positions about subjects which may be considered controversial, have you been criticized or opposed in your ideas by various publications?

A. Daily, almost.

Q. Have you ever had caricatures drawn of you by cartoonists?

A. Again, almost daily.

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TESTIMONY OF ROBERT JORDAN

December 5, 1984

[3/1-2]

ROBERT OLIVER JORDAN, a witness called by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q. Mr. Jordan, would you please state for the record, and speaking in as loud and as clear a voice as you possibly can so that every juror hears you, what is your full name?

A. Robert Oliver Jordan.

Q. And where do you live, Mr. Jordan?

A. At 205 East 78th Street, New York City.

Q. What is your occupation?

A. I'm in the advertising business.

Q. And for what length of time have you been in the advertising business field?

A. Twenty-eight (28) years.

Q. At the present time with what agency, office or organization are you affiliated in this field?

A. I'm with an agency known as Sachi and Sachi Compton, Incorporated.

Q. And what is your position with that company officially?

A. I'm chairman of the board of that company.

• • •

[3/2-3]

Q. Among the clients serviced by the Compton Agency in 1983, are you familiar with whether or not the agency had anything to do with a company that produced a product called Campari?

A. Yes, we were the agency for a company called Campari USA.

Q. For what length of time, prior to the fall of 1983, has the Compton agency been acting as the agents for that particular product?

A. We started with them in early 1981, March, I believe.

Q. Would you tell us what you know or knew then about the nature of that product?

A. Certainly, it's a distilled spirit, widely popular in Europe, which is consumed as a mixed drink.

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[3/5]

Q. The first of these is called "Geraldine Chapman Talks About Her First Time", and that appears on the back cover of *New York* magazine. The second is called "Tony Roberts Talks About His First Time", which appears on the back cover of the *New Yorker* magazine.

The third of these is called "Elizabeth Ashley Talks About Her First Time". And the last of these exhibits is entitled "Jill St. John Talks About Her First Time". Could you tell me, if you will, Mr. Jordan, what some of the other magazines were in which these ads appeared?

A. Certainly, I could. It was a lengthy list, but just for example, *Life* magazine, *Cosmopolitan*, *Playboy*, *People*, *Newsweek*, *Money* magazine, the *New Yorker*, *Vogue*, *Tennis Magazine*, and a number of others.

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[3/6]

Q. Could you, on the basis of work done at your agency, give us some idea of approximately what the total audience or readership was that saw these ads in the various magazines in which they were inserted?

A. Well, I don't know the exact figure, but I would estimate roughly, over the cumulative length of that campaign, which something about like three (3) years, it had to be in excess of ten million (10,000,000) people.

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[3/7-12]

Q. Let me just take, for example, the first of them, Exhibit 8, and read the text to you.

Do you need to have a copy of this before you?

A. I doubt it, sir.

Q. All right, taking for example, the text of Exhibit 8A, showing the picture of Geraldine Chaplin—excuse me,

I'll withdraw that. Let me use the Jill St. John one. The text reads:

"St. John: My first time was in the Tre Scalini, that adorable sidewalk cafe in Rome.

Interviewer: Oh, really? Right out in the open?

St. John: Sure. You see, I'm basically an outdoorsy-type person.

Interviewer: I see. You must tell me all about it.

"St. John: Well, we were just relaxing after a hard day shooting, just me and the crew. It happened with the stunt man.

Interviewer: That stunt man? That sounds a bit risky.

St. John: Oh, it wasn't really. You see, he was Italian and they just seem to know about these things.

Interviewer: Go on.

St. John: He was very romantic. He leaned close and gently, 'Well,' I said, 'I've never been shy about anything before.' He gave me a charming grin, then ordered a Gingerly for me, that's Campari and ginger-ale and soda, and a Campari and soda for himself.

Interviewer: A little mix of Italian and American. How interesting. How was it?

St. John: Very satisfying, after that long, hot day. See, it was deliciously light and so refreshing, a very special experience.

Interviewer: Did you ever have it again?

St. John: Of course, many times. It's not the kind of thing you try once and then you forget about it. I've gone out with some outstanding men and they all know one or two new ways to enjoy it. I prefer the Exotic, that's Campari with grapefruit juice.

Interviewer: Well, you seem to have come a long way since your first time.

"St. John: What can I say. It's hard to resist something when it just keeps getting better and better."

Now, were you familiar with the preparation of the text of that ad?

A. In general terms, sir, yes.

Q. What was the general objective in the preparation of this interview format for these kinds of ads?

A. All right, let me start with the objective of the advertisement now. First of all, Campari was a very popular product, really, throughout western Europe. It really was not much of a factor in the beverage business in the United States and had not been tried by very many people. It has a rather unique bitter flavor, and as a consequence it is something of an acquired taste. In other words, if you try it, the first time you may be somewhat ambivalent about it. But, perhaps, the second time you drink it you get to like it a little more. Perhaps some of the same way people feel about olives—some of them do.

The objective of the copy, therefore, was to really make the point, if you try this, you may feel a little ambivalent about it, but you'll kinda get to like it. And if you take it a second time, you may get to enjoy it even more.

Q. Was there a sort of double meaning in the text as it was written?

A. Yes, there was. And that was essentially a kind of humorous, tongue-in-cheek, attention sort of device. That's right.

Q. And the tongue-in-cheek, attention getting device, while ostensibly about the liqeur had as its double meaning what?

A. Well, frankly, first sexual experience.

Q. Was it the intention of the advertising agency in preparing these to do so tastefully?

A. Yes, it was.

Q. I notice on the ad, and I'll show you Exhibit 1 (sic), that there appears—the Jill St. John one again—

THE COURT: It that 8A?

Q. There is a little *c* in a circle, which says, "1983, Imported by Campari USA, New York, New York, 48 Proof, Spirit Aperitif Liqeur." And then, on the bottom there is a little r in a circle.

Are you familiar with those legends?

A. Yes, I am.

Q. What does the *c* with the circle indicate?

A. Well, the *c* is a copywrite registration.

Q. And the r?

A. And the r is the registration of the trade mark.

Q. Okay. And approximately how much money was spent by your client, the Campari company, in producing and disseminating these ads to the millions of people who saw it in various places?

A. Just about three million dollars ($3,000,000.00) over the three (3) years that we advertised it.

Q. Earlier in this trial, Mr. Jordan, there was introduced into evidence as Plaintiff's Exhibit #1, part of Plaintiff's Exhibit #1, an ad which appeared in the November, 1983 and in the March, 1984 issues of *Hustler* magazine called, "Jerry Falwell Talks About His First Time". You notice that publication, comparing it with Plaintiff's Exhibit's #8A, 8B, 8C, and 8D, do you notice any apparent similarities between the Falwell ad and the other ads which are agency prepared?

A. Well, I do now and I did when it was first brought to my notice.

Q. Mr. Jordan, would you tell us, did you on behalf of Campari itself either seek for, solicit of obtain the consent of Reverend Falwell for the ad shown in this exhibit from Hustler magazine?

A. No, sir, we had absolutely nothing to do with the preparation of that ad.

Q. Was your permission or consent sought or given with regard to the use of the Campari bottle, the orange drink and the other drink in the smaller bottle, together with the tongs and ice cube which appear in the Falwell ad?

A. It was absolutely not sought.

Q. And I call your attention to the Jill St. John ad and I ask you to compare the graphic art work of the depiction of the bottle, the two glasses, the drinks, the tongs and the ice cube which is shown in the authorized ad of Jill St. John prepared by Campari and the graphic material which appears in the Falwell ad: A Campari bottle, two drinks, tongs and a glass—and an ice cube rather. Do they appear to be the same?

A. They appear to be identical.

Q. Looking at the Falwell ad with the Campari trade mark and copywrite material, to your knowledge, Mr. Jordan, was that pirated by *Hustler*?

A. It appears to me to be identical and therefore was pirated.

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[3/13]

Q. Did you and your client discuss that ad?

A. Yes, we did.

Q. And subsequent to the conversation which your client had with you about the ad, did you do something?

A. Yes, I did.

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[3/13]

Q. After this conversation, Mr. Jordan, did you on behalf of Campari write a letter to the publishers of *Hustler* magazine?

A. Yes, I did.

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[3/15]

Mr. Jordan, after you wrote this letter expressing your shock and dismay and belief in the damage that had been caused, did you receive any response from Larry and Althea Flynt, publishers of *Hustler*, or anybody on their behalf?

A. No, I did not.

TESTIMONY OF RONALD GODWIN

December 5, 1984

[3/23]

RONALD GODWIN, a witness, called on behalf of the plaintiff, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

[3/29]

Q. How would you describe the amount of engery [sic] and time that is spent by Jerry Falwell in the many, many activities in which he is engaged in his many ministries?

A. Well, it is an exhausting schedule.

Q. How many hours a day would you say Jerry Falwell works at these ministries?

A. It might vary, but seldom would it ever be under twelve (12) hours a day.

Q. How many days a week?

A. Just seven (7) days a week.

Q. Are you familiar with Jerry Falwell's extensive traveling around this country?

A. I am.

Q. Do you sometimes travel with him?

A. Frequently.

Q. On a day-to-day operational basis, Dr. Godwin, how much time do you spend daily with Jerry Falwell?

A. Well, it varies, but I spend anywhere from an hour or so a day to most of the day.

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[3/30-31]

Q. Did you see what his reaction was when he read that ad over?

A. I was not present when Dr. Falwell saw the ad. I was with Dr. Falwell shortly after he had seen the ad.

Q. What did you observe about Dr. Falwell, Jerry Falwell, shortly after he had seen that ad?

A. He was more troubled, more serious, more concerned than I had ever seen him on any other issue, crisis or otherwise.

Q. Did he appear to be angry?

A. Yes, and deeply hurt, offended, I think.

Q. In all of the years of your intense association in working with Jerry Falwell had you ever seen him as hurt, despaired or upset?

A. No, sir, never.

Q. About anything?

A. No, sir.

Q. In the time that has gone on, in the approximate year that has transpired since he first became aware of that ad, have you noticed any change or difference about Dr. Falwell, Jerry Falwell?

A. There was a great deal of preoccupation and it was more difficult for me as an administrator to get Dr. Falwell's attention and to get him to be able to focus on the details of the organization we administer.

Q. Is that something that has continued since the fall or October or November of '83, even up to the present?

A. Generally so, yes, sir.

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CROSS EXAMINATION

[3/44-45]

Q. Thank you; after this ad parody appeared, Dr. Godwin, did you notice any decrease in the quantity of Mr. Falwell's activities in terms of preaching and speaking at different things? Did he cut back his schedule in any way?

A. Not to my knowledge. I believe he has kept his commitments.

Q. Did you notice any effect on the quality of his performance, as you watch the Old Time Gospel Hour and you see him speak? Did he seem to lose his dynamism in speaking, objectively?

A. I don't—I have seen Dr. Falwell's general demeanor and behavior in subtle ways and in ways which are apparent to me, which may or may not be apparent to national audiences, affected over the last period of months.

Q. Would you describe exactly what you observed in terms of qualitative effect on his abilities?

A. Dr. Falwell is a very enthusiastic, optimistic individual. I often describe him as a person to whom the glass is always half full and never half empty. A certain degree of that enthusiasm and optimism, ability to concentrate, to focus on the myriad details of organizations such as ours, in my opinion, was diminished.

Q. You say it did impair his performance?

A. In my opinion, yes.

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[3/47]

Q. When you first saw him after he had been exposed to it, did you notice any overt emotion on his part?

A. Well, yes; I have already described the fact that he was more troubled, more serious. He is not a very—if you are asking me about overt emotion, was he out of control, no.

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TESTIMONY OF RICHARD WARREN LEWIS

December 5, 1984

[3/84]

RICHARD WARREN LEWIS, a witness, called by the defendant, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

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[3/88]

Q. And where was that meeting, sir?

A. In the conference room of Larry Flynt Publications, Century City, Los Angeles.

Q. And who was present at that meeting?

A. The various editors, legal counsel—would you like for me to name a few people?

Q. Yes, please.

A. Kelly Garrett, who was the Executive Editor at the time, I believe; Bruce Helford, who was another editor; Dwaine Tinsley, editor; David Kahn, legal counsel; Larry Flynt, editor and publisher; and several others.

Q. Did any of these people create the idea which is reflected in that ad parody?

A. No.

Q. Who did create that idea?

A. It was created by a consultant named Michael Salzbury.

Q. And was that ad parody idea sold to *Hustler Magazine*?

A. Yes, it was.

• • •

[3/89]

Q. Yes, sir. What was said at that meeting about Hustler's intent in publishing that ad parody?

A. The intent was satire and humor. It was a parody.

Q. Now, can you recall what anybody said in words of substance?

A. I recall most vividly the conversation that went on for some time between Larry Flynt and David Kahn, the legal counsel. Larry—let me say David wanted to put "Ad parody. Not to be taken seriously" at the bottom of the page. And Larry felt that no one could possibly take the ad parody seriously.

• • •

[3/91-93]

Q. What were your feelings about the ad parody?

A. My feelings were those of the other editors there, I mean, we laughed at it. We thought it was satire. And we done [sic] that many times in the past with public figures.

Q. Was there any thought in your mind as to whether any reader would take that as a factual statement about Mr. Falwell?

A. There was none.

Q. Was there any thought in your mind as to whether any reader would view it as an authentic Campari advertisement?

A. No, there was no question in my mind that it could be taken any other way but as a parody or a satire.

Q. What is there about the parody that made you think that no one would—that no reader would take it as a factual statement about Mr. Falwell?

A. The language, the copy. I believe that Mr.—Reverend Falwell's feelings about drinking, for one, are well known, and about morality are well-known.

Q. All right, looking at the ad parody that you have in front of you, can you point to any of the things in there specifically that form part of the basis upon which you thought that no one could take this ad seriously?

A. The copy involving the Reverend Falwell's mother; the business about the outhouse; the language, you know, the profanity that exists in the ad. This is something that would not ordinarily appear in a real Campari ad.

Q. Let me direct your attention to the language above the name Campari, at the bottom, left-hand side. The language starts out: "Campari, like all liquor, was made to mix you up."

A. Yes?

Q. Was anything about that language that influenced your opinion as to whether anyone would take that as a factual statement?

A. Was there any question in my mind?

Q. Yeah.

A. No, there was none.

Q. What is that. Can you tell us?

A. Because it does not read like a real ad.

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[3/96]

Q. When you say that we have done that kind of thing many times in the past, what kind of thing are you talking about?

A. We had done ad parodies for other products. One that comes to mind is Dewars Scotch whiskey. We have

done John DeLorean and we've done various car companies, cigarette companies, consistently, throughout the history of Hustler Magazine. Ad parody has been one of the things we do.

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[3/97]

CROSS EXAMINATION

BY MR. GRUTMAN:

Q. Mr. Lewis, do I understand that since February of 1980, when you assumed your position at *Hustler* up to the present time, you've had continuous responsibility for the overall content of the magazine, *Hustler*?

A. No.

Q. When is it then that you assumed responsibility for the overall content of *Hustler Magazine*?

A. In April of this year.

Q. April of 1984?

A. Yes.

Q. So at the time of the first publication in November of 1983, the November, 1983 issue of *Hustler*, you did not have an editorial responsibility for the contents of the magazine.

A. That's true.

Q. Who did?

A. Sir, I'm hesitating only because it's either Kelley Garrett or Bruce Helford, I can't recall which.

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[3/111]

Q. I draw your attention, Mr. Lewis, to a document that's been received into evidence—let me show it to you—it says, "Hustler November Campari Ad. BH. 8/4/83. Jerry Falwell Talks About His First Time." Have you ever seen this document before?

A. Yes, I have.

Q. When did you first see it?

A. Several months ago, I would think.

Q. Several months ago would be subsequent to August '83, would it not?

A. I said several months ago. It would not be subsequent to August, 1983.

Q. I'm sorry, your seeing it was subsequent to August, 1983, am I right?

A. That's right.

Q. Would you agree that it was subsequent to the time that it appeared in the magazine?

A. That this—

Q. That you saw it.

A. No, I saw it after it appeared in the magazine.

TESTIMONY OF LARRY FLYNT

December 6, 1984

[4/81]

LARRY FLYNT, the defendant, called in his own behalf, testified as follows:

DIRECT EXAMINATION

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[4/85-86]

Q. Mr. Flynt, do you recognize Exhibit 4?

A. Yes, I do.

Q. Can you tell us when you receive [sic], if at all, to the court?

A. This is a list of suggestions for ad parodies that was submitted by a freelance art director in Los Angeles.

Q. Now, when was it that—did that come into your possession before today?

A. Yes, it did. I received it then and I've seen a copy of it since then.

Q. When you say then, what date are you referring to?

A. July of 1983.

Q. Do you recall the circumstances of your receiving that document?

A. Yes, I do.

Q. Can you tell the jury the circumstances?

A. Yes. We invite various people in the creative arts area and cartoonist, art directors, you know, to submit ideas for ad parodies and cartoons and we pay for these ideas. And we get them from people all over the country.

Q. How did that come to you?

A. Well, Mike Salisbury had been asked to submit some ideas. He submitted a list to us and we purchased

approximately four (4) or five (5) of the ideas. We paid, I believe, five hundred dollars ($500.00) a piece for them.

• • •

[4/87]

Q. Now, can you tell us, looking at Exhibit 4, which of the items on there you recognize as having been purchased from Mr. Salisbury by Hustler?

A. The Campari ad, the Coca-cola ad, the Kool ad, the Malboro [sic] ad, the Trojans may have been one of those, I'm not sure.

Q. Now the Campari ad is the one that you said that you purchased is number six (6) on that list, is that right?

A. Yes.

• • •

[4/88-89]

Q. Turning to item number six (6) on there, can you read for the jury what that item is?

A. It says Campari. "Jerry Falwell talks about his first times [sic]. Something like, I never really expected to make it with Mom, but then after she showed all of the other guy [sic] in town such a good time, I figured, what the hell."

Q. Now, did you have any discussions with Mike Salisbury about this list?

A. About the preparation of it?

Q. Yes.

A. No.

Q. Was the list given to you in this form?

A. The list was submitted to me with an attachment of art work. Otherwise, he attached the original Campari ad. I believe a photograph of Jill St. John was on there and then he suggested getting a colored photograph of Reverend Falwell and putting it in place of theirs and then building the text around this idea.

Q. Was any of the words written in Number six (6) written by anyone at Hustler?

A. No.

Q. What did Hustler Magazine do after they purchased the items you've referred to on this list? Specifically, what did they do with item number six (6)?

A. After the ideas were purchased they were discussed at an editorial meeting where both the art director and the editor in charge of the parodies could compare their work. An art director does the illustration in terms of laying out the physical design of the ad. The editor writes all of the copy that appears within—the type that appears within the ad.

• • •

[4/90-92]

Q. Well, let me ask you a question if there was any discussion about what was intended to be conveyed by the ad parody that you hold in your hand?

A. Well, we wanted to poke fun at Campari for their type advertisement because the innuendoes that they had in their ads made you sort of confused as to if the person was talking about their time as far as a sexual encounter or whether they were talking about their first time as far as drinking Campari.

Of course, another thing that you had to do is to have a person, you know, that is the complete opposite of what you would expect. If someone such as me might have been in there I don't know how people would have interpreted it. But if somebody like Reverend Falwell is in there it is very obvious that he wouldn't do any of these things; that they are not true; that it's not to be taken seriously. But where the irony and humor is found in this, while it might not be funny to certain people and they may not see the satire in there, they have to consider how different people around the country perceive Falwell to be in terms of his political activities, his beliefs, how he wants people to perceive him as, you know, he would like to be loved, have recognition, acceptance by the people. There's nothing wrong with this, but when it happens, you know, ego comes into play. The best example I can say is when somebody asks me why Reverend Falwell, the only thing I can point out is why did Walter Mondale, during the debates in Louisville, "Do you want Reverend Falwell to be involved in selecting the next Supreme Court?" Now, that was strictly to make a political point, but that means that he, more than any other evangelist is involved in the mainstream of politics. And there is a great deal of people in this country, especially the ones that read Hustler Magazine, that feel that there should be a separation between church and state. So, when something like this appears it will give people a chuckle. They know this was not intended to defame the Reverend Falwell, his mother or any members of his family because no one could take it serious.

* * *

[4/93-97]

Q. All right. In terms of the idea of Reverend Falwell giving an interview to Hustler Magazine, what do you think the believability of that is to the readers?

A. Well, all of our readers know that Reverend Falwell has sued Penthouse Magazine for running a legitimate interview with him, so it's doubtful—his—because of his personal, you know, beliefs and convictions, Hustler and myself have been a target of him and the Moral Majority, you know, for the past ten (10) years. So it's highly unlikely, you know, that he would—that there would be any remote possibility that he would consider giving an interview to us.

Q. All right, now, looking at the items specifically, can you tell us what specific items in there you think are totally unbelievable?

A. Well, you know it's a put-on when you read the first one where it says, "My first time was in an outhouse in Lynchburg, Virginia." I mean, you start off there.

Q. Now, read the interviewer's question. "Wasn't it a little cramped?"

A. Well, you really don't know what that means at that point. I mean, you know, you see the ad, you know it's a put on but—

Q. Now, Reverend Falwell responds, "Not after I kicked the goat out." Now what to you was the believability to that suggestion.

A. Well, you're talking about someone's first time. It's kind of difficult for two (2) people and a goat to fit in an outhouse. I'm not trying to be funny. I just, you

know, don't really understand the point you're trying to make.

Q. Well, I'm asking you at this point to tell me what about this ad parody makes it so clear to you that it was something that never could be believed. Now, let's go down the items specifically, if you can, and tell us what about this ad parody makes this impression upon you?

A. Well, you know, as far as making it with his mother, I mean, that's so outrageous, I mean, that no one can find that believable.

Q. What else can you tell us?

A. The irreverence and the whole iconoclastic appeal about your mom, "Isn't that a bit odd. I don't think so. Looks don't mean that much to me in a woman." I mean, if this stuff was true it would be extremely inflammatory and offensive, but the fact that you know it's not true, you know, I can't comprehend how anyone could take it serious. I mean, someone may not like it, but that's not what we're here for today is whether somebody likes it or not, but whether it's in violation of the law.

Q. Interviewer: "Go on," reading at the middle of the page. "Falwell: Well, we were drunk off our God-fearing asses on Campari, Ginger Ale, and Soda, that's called the Fire and Brimstone, at the time." Now, what did you think about the believability of that statement?

A. I think it's totally unbelievable.

Q. Is there anything in this ad parody that you thought at the time would be believed?

A. Not anything.

Q. Look at the language at the bottom of the left hand corner where it says, "Campari, like all liquor, was made to mix you up." Now, what did you think about the believability of that statement?

A. Well, again, that is part of the parody on the product itself, you know, the liqueur. I mean, you're not going to believe that really, you know, anymore than you're going to believe the material about Reverend Falwell.

Q. Had you seen liquor advertisements before this advertisement parody was published.

A. Pardon?

Q. Had you seen authentic liquor advertisements before this ad parody was published?

A. Yes.

Q. Now, had you ever seen a liquor advertisement that told you that you—that the liquor was made to mix you up?

A. No.

Q. Does Hustler advertise liquor?

A. No, we don't.

Q. Reading on:

> "It's a light, 48 proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered."

Now, what was your opinion about the believability of that statement?

A. Well, no liquor company is really going to use that kind of language, you know, to describe their product.

Q. Reading on:

> "For your first time, fix it with orange juice or maybe some white wine. Then you won't remember anything the next morning. Campari, the mixable that smarts."

Tell us what your opinion was about the believability of that statement?

A. That's—I mean, that's not believable because, you know, someone is saying, you know, drink our liquor and you won't remember anything the next morning. I mean, again it becomes obvious.

• • •

[4/99]

Q. Now, when the discussion concerned Campari, was there anybody at that meeting who expressed the concern that a reader might take the ad parody to be a true statement of fact?

A. No, no one. But please understand how it works. Once an editorial decision is made, Xeroxed copies of whatever goes in the magazine goes to the legal department. We have, you know, three (3) in-house attorneys who look this over and if it doesn't have their approval on it, it don't go in the magazine. They're often making changes because the editors, as well as myself, you know, do not have legal minds.

Q. What effect, if any, did you intend for the ad parody to have on Jerry Falwell?

A. We're responding to our own readership; we didn't intend for it to have any effect on him. And the

fact that he's you know, responded the way he has, you know, is just as, you know, unbelievable as the ad is.

• • •

[4/108]

Q. Publishing the ad parody that is in front of you, Exhibit 1, was there any intent on the part of *Hustler* to hurt Mr. Falwell?

A. No.

Q. Now, the ad parody was published in March 1984. Is that correct?

A. Possibly. I don't know.

• • •

Q. At the time that ad parody was published, in March of 1984, were you involved in a position to publish it?

A. Ah, yes. Because I recall working on this issue.

Q. Now, when it was published, what was the intent of *Hustler*, if any, to hurt Mr. Falwell?

A. There was no intent.

TESTIMONY OF SAUL NIEDORF

December 6, 1984

[4/200]

SAUL NIEDORF, a witness, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

• • •

[4/201]

Q. Are you board certified in any specialty in the field of medicine?

A. Yes, I am, I'm certified as a Diplomate on the American Board of Psychiatry and Neurology, in psychiatry, and also in child psychiatry. Both of my examinations were completed in 1969.

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[4/202]

Q. Do you do any teaching?

A. Yes, I'm on the faculty of the School of Medicine at U.C.L.A. It's called the Neuro-Psychiatric Institute. And prior to that, for seven years, I was on the faculty at Washington University School of Medicine at St. Louis. I've also lectured at Dartmouth and the University of Maine.

Q. Now, Dr. Niedorf, has Larry Flynt been a patient of yours?

A. Yes, he has.

Q. When did you first see Larry Flynt?

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[4/202-204]

A. All right, I was asked to see him by his brother in November of 1983, and I saw him, I think, for a total of eight (8) or nine (9) hours in November, and the first

day of December. And then, he went into prison as a result of the behaviors that I believed were a product of his mental illness, and he stayed in the mental hospital, or the medical center of the Springfield Institution, where he was confirmed and—the same diagnosis that I had felt he had, bipolar illness, which is the current phrase used for manic depressive disorder.

And, they, they stated that he had this illness. And then he went into another institution, also a medical-psychiatric institution—continued in Butner, North Carolina. When he finally got out in the summer of this year, later that summer I was contacted again. By this time, he had changed totally in his mental condition. He was no longer in the manic phase of his manic depressive disorder. He had entered into the depressive phase.

Q. All right, Dr. Niedorf, let's go back now to November of 1983, when you first—when Larry Flynt first became your patient. Do you have that in mind?

A. Yes, I do.

Q. All right. Did you conduct an examination and an evaluation of him at that point?

A. Yes, I did.

Q. Could you tell us, just in summary fashion, what you did?

A. Well, ah, it was the first time in a long time that I had made a house call, because my office has thirty-eight (38) steep steps. And it's hard to get up there, and it's —so I made a home visit. And Mr. Flynt, at that point, I guess, very typical behavior for him, had me conduct the

interview for him in his bathroom. Him sitting on the comode.

And after two and a half hours I had come to the conclusion that he was a very ill man, and that his illness, as—on the basis of my mental status examination, had a good many of the elements of mania—of manic depressive or bipolar illness.

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[4/207-208]

Q. Could you describe to the Court and jury what is manic depressive illness?

A. Well, it has two distinct phases, and those phases can last for hours or days or weeks, or months or even years. Generally, it's a matter of many weeks, or even many months. And the—to a greater or a lesser degree, the individual is either in the manic episode or the manic phase, or the depressed or depressive phase.

I could describe the manic phase first, and that's a very clear, distinct period where there's a gradual, or sometimes sudden onset of a highly expansive and elevated mood. Or, it could be irritable, or both. Especially if a person is frustrated, that positive, optimistic, upbeat feeling suddenly becomes hostile, and nasty and mean. There's generally an active and hyperactive field to the person. They have pressured speech, and they have what is the classic symptom, a flight of ideas.

We saw that on the tape earlier this morning, where—and yesterday—they can't stop themselves. The brain suddenly gets going, and it just clicks off a whole series of names, or associations or places or ideas, that all seem to run on. And they're very difficult to interrupt. The

—attorneys or psychiatrists are the only other people you can't interrupt—with difficulty.

• • •

[4/208-210]

A. The flight of ideas are the—these sudden tirades or associated ideas where one thought after another may be connected by just a sylogal sound like "Henry George, Boy George," and then a whole bunch of words after. Or suddenly a bunch of names will appear. Or a bunch of dates will appear.

People with this illness—Mr. Flynt in particular, have an inflated sense of themselves. They feel—they feel supreme. They feel very powerful. They feel they know everything. They know everybody. They can do everything, and they try to. They need very little sleep. One of the things that was going on with him then was that he wasn't sleeping very much, and that greatly disturbed his brother, and that was one of the big fears that he had, that he would burn himself out.

He wasn't sleeping, there was a great deal of distractibility and suggestibility. Just about anything you say to him, he would pick up on, and agree with you, and go on. Or, if he were frustrated, he would disagree and become nasty.

Q. What do you—what is manic depression? How would you characterize that? Is it a mental illness?

A. It's an illness. It has a biological basis to it. It's lifelong. It's a lot like—well, it's not like—one could analogize to diabetes, and say that you could control diabetes, we don't know what causes it. We know that it

lacks—there's lack of insulin, and we know if you replace the insulin that you can control the illness. But yet, many complications of that illness will occur in diabetes. The same is true for manic depression. What usually happens is that the complications set in for manic depression. The most serious complication for the depressive phase or manic depressive illness is suicide.

The most serious complication of the manic phase is legal difficulties, and then the next most serious is substance abuse.

Q. What was his physical condition at the time you evaluated him?

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[4/211]

Because of his paralysis, he has to compensate with a sense of potency. And, here he is impotent in a sense, in every respect, and he has to act in a denying way to any inferiority or any disability. So he will deny any disability. He would, he would experience anything that limits or controls him in a very harsh or threatening sense, and try to compensate for it. Therefore, he would try to deny any incapacity, including a mental incapacity.

He was convinced that he was normal and I was crazy.

• • •

[4/214-215]

Q. All right. Now, I want to direct your attention to a video-tape that was played here in the courtroom.

A. Yes.

Q. Were you present during the playing of the video-tape?

A. Yes, I was.

Q. And, have you seen the video-tape, or a transcript of it, at any time prior to that?

A. Yes, I had.

Q. What had you seen?

A. I had seen the video-tape prior to that time, approximately one week ago. A little less than a week ago.

Q. Now, based on your observation of the video-tape, do you have an opinion as to Mr. Flynt's mental condition at the time that he gave that deposition?

A. Yes.

Q. What is your opinion?

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[4/216-217]

A. My opinion is that the behavior, the utterances, the emotional state, the kinds of episodic flight of ideas, especially the inflated sense of himself, and especially the delusional beliefs that he held, the false beliefs that he tenaciously held against all reality, against the intrusion and against the reflection of all reality, is a classic example of manic depressive disease.

The individual can look and act as obnoxious and irritable and cranky—they can look as faking as—as malingering as possible. But you cannot sustain that kind of behavior unless you truly are a genuine manic depressive. He has the history for it, he had the, the presentation of manic disorder when I saw him originally. He continued to have it in its typical waxing and waning course. Classically, the mania rises and falls. One day, the person is more generous than the next, and gives away money, or

gives away candy on the street. The next day, they can be cranky and irritable, and suspicious and paranoid. The next day, they can be euphoric and exalted.

They have a tendency to dress bizarrely, or doll themselves up. If they're women, they often make up in a bizarre way, in excessive ways. They do also become hostile whenever they're thwarted. And most of all, they have a tendency to involve themselves in activities or in statements that have painful consequences, but they don't recognize the pain that they are going to receive. They put themselves into enormous hot water, and for that reason, as I say, the most typical complication of manic disorder is legal difficulties.

Q. Did you see those things exhibited on tape?

A. Oh, very much so. I think that you don't have to be a psychiatrist to, to see that—

THE COURT: Are you telling us that he was totally incapacitated to testify, or that his ability to testify was limited at that time?

WITNESS: Well, Your Honor, no one is totally incapacitated—

THE COURT: Right.

WITNESS: —unless you're in a coma. But, what I'm suggesting is—

THE COURT: His capacity to give testimony was limited.

WITNESS: Limited by the intrusion, periodically, repetitively, relentlessly, of his false beliefs.

• • •

[4/218-222]

Q. Did you form the opinion as to whether or not he was competent or had the ability to accurately perceive events?

A. I think that his thinking for many years, and especially during the hours of that deposition, has—his consciousness has been subject to the intrusion of false beliefs, which he tenaciously holds, regardless of the facts or regardless of how things are presented to him.

He may or may not be under the emotional pressure to express them. A lot depends on the type of genetic makeup which you're born with, in a sense—as to how this disorder manifests itself.

Q. You believe he had the ability, the capacity, to accurately perceive events at the time that deposition was taken?

A. No. He would have the intrusion of false beliefs, and it would not be accurate. They would be tinged and colored in a sense, not only factually but emotionally altered.

Q. You believe he had the ability or the capacity to accurately recall events at the time of his deposition?

A. No, again, he would have "clang association," so that one element of recall would elicit a connection with another that was highly irrelevant, but only associated perhaps with the sound of the word, but not in terms of a rational connection of time or place or person. There are too many irrationalities in a manic's thinking to make them a good witness to remember things.

Q. In your opinion, at the time of his deposition, did he have the competency to accurately recount and describe past events?

A. Sometimes excellent. His memory, by the way, is incredibly good. In testing his memory, he has extraordinary abilities, and he uses them to great advantage. But at other times, his memory was totally involved in the "clang association," in the irrational associations, and therefore, those memories were inaccurate.

Q. So in answering my—what is the answer to my question, as far as his ability to accurately recount past events?

A. He did not have that capacity. Consistently.

Q. Now, did you notice any physical symptoms manifest—manifestations, characteristics, so forth, on that tape, that were of any significance to you as a psychiatrist?

A. Yes. The—his facial expression did not change very much at all. He was in a state of high excitement and agitation. There wasn't the kind of variation that one would have hoped for in a more normal person. Once in a while, he moved his nose. I think that he was either trying to fix the glasses that were falling down on his nose, or he was actually having what psychiatrists call a "schnoutzkapf," which is an old German word that means your nose crinkles.

These are involuntary grimaces that people with a lot of emotional pressure can make. The depressed person can frown, so that the creases in their—between their eyes is very deep and very tight, and the corners of their mouth go down. The manic often has an excited and tense kind of air to them. But, the physical qualities aren't as important to a psychiatrist as the mental qualities. The communication of the patient, the way that they talk, the kind of thoughts, the kind of emotions they express are what we use. Just as cardiologists listen to the heart, we listen to the content of what a person says.

Q. All right. What did you determine from the content—what he said, to support your opinion that at that time he was not competent and couldn't accurately testify?

A. He lacked judgment. He had unwarranted grandiosity. He was reckless in his talk, he had the typical talk of the manic, which involves sexual, political, and religious and sometimes occupational preoccupations. But they're, they're generally overinvolved with everything and everybody that is at all significant in their own or in public life. They're colorful, they're flamboyant in the way they present themselves—and he certainly did. There was a lot of theatricality to, to some manics.

The most important thing, though, was the flight of ideas. The way in which he would have this accelerated, nearly continuous kind of monologue, with these abrupt changes from topic to topic,—you might find some association to them, but sometimes it was based on some distracting stimuli. Somebody who might be in the room could be incorporated into their ideas or their responses suddenly. Or they might make a play on words. He did that on a number of occasions.

Sometimes the flight of ideas can be so disorganized that it makes no sense at all. They're incoherent, and they are very distractible. That means that they have very rapid changes in the subject that they're talking about.

They might respond to, as I say, the external stimuli are irrelevant, and yet they throw them in.

• • •

[4/222-225]

Q. Is, is that a symptom of mania?

A. The symptom of self-destruction is present in mania, but it is not clear, as it was with Mr. Flynt in his depressive phase he wanted to die, he had no purpose to live, he was—

Q. What about the manic phase?

A. In the manic phase, it's defended against, and it's expressed often in a hidden way. In other words, they do something that's reckless. They drive recklessly, they, they believe that they have powers to survive anything. And they often get hurt, so that the unconscious element of self-destruction leading to behaviors that are self-destructive, but not recognized as such—the painful consequences of their actions is not apparent to most manics.

Q. What about any kind of gross, vulgar behavior? Is that any kind of a symptom of manics?

A. Well, it depends. Some manics are mild and mellow, and they just go on and make you laugh, and the average manic entertains, and it's infectious. It catches people up, and they start to talk and act like the manic. They make some of the same associations.

And I noticed on the tape that oftentimes people present with him—not often, but on a few occasions—actually got involved in making the same kind of irrelevancies that he did.

Q. What about vulgarity?

A. That's more typical of the older manics—it's unusual to see somebody who's younger to do that. But older manics often have a sudden change in their demeanor, so that you see somebody that's not at all expected to be that way, suddenly the vulgar course of abominable language comes out, and it's disgusting and foul. And part of it—

Q. Was that then—

A. Yes.

Q. Was that typical for him?

A. Yes. It's—

Q. Was that of any significance?

A. For him, it's typical. He's much more likely in his manic phases to use a stream of invectives in that way. Especially when he's thwarted, when he's frustrated, when he's insecure, if he's in pain, if he's been injured, or if he's threatened, if he's made to feel powerless or helpless. He'll reaffirm himself with the foul language.

The foul language basically is a defense against the sense of helplessness and vulnerability and weakness.

Q. What about the, the illusional type of testimony? Things that were obviously—

A. I—

Q. —in the sense of the reference to Kennedy, and that kind of language.

A. Yeah. That's classical. There is a, a very clear statement made, which has been approved of by all psychiatry—I shouldn't say all—about 25,000 psychiatrists in

the United States and Canada have approved a description of manic depressive disorder in the Diagnostic and Statistical Manual, Number 3. That was in 1980. And that specifically says that the manic often talks about delusions of special relationship—either to God or to the President. That's very common. But to any famous person.

It's—and oftentimes the delusion is to a dead person. I mean, you could be speaking to Marilyn Monroe, for example, as Mr. Flynt often did on the telephone. Long after her death.

• • •

[4/225-226]

Q. Is what—the symptoms that you saw after viewing the tape, were they consistent with the symptoms of the condition of mania, as described by this in court, that you referred to?

A. Yes. Very, very typical. He is a classic textbook case in the way he presents himself. The, ah, the previous examiners felt that he was less severely ill. And it depends on when you catch him. Oftentimes he will have most of the symptoms, but many times he can have them all. He is, over the long run, if you listen to him for a few hours, let's say three or four hours, you'll catch every symptom of mania.

Q. All right. Do you think you now have summarized the points that are the basis of your opinion?

• • •

[4/226-229]

A. Yes, I'd like to just say, that one of the tests of an illness is that, if you treat it, it gets better. In other

words, if you, if you use what is typically the correct treatment for an illness and it gets better, you're sure that you have the right illness.

For instance, if you think it's pneumonia, and you give penicillin, and the person gets better, they have pneumonia. You assume that. Especially if it's causally related in time and dose.

Well, when we use the correct medicine for him, he does improve. In other words—

Q. That, that—is that then what has occcurred? You did treat him—

A. Yes.

Q. —after he was returned to California?

A. Right.

Q. And was under your care. What drugs did you administer?

A. He is presently taking lithium, which is the standard treatment for manic depression throughout the world. He's taking lithium carbonate, 300 milligrams, 2 or 3 times a day. On occasion, if the blood level drop—we monitor that by blood levels on a weekly basis. If the level of lithium drops, we increase the dose. If it is too high, and could give him toxic symptoms, we decrease it in a regular basis.

He's also given an anti-depressant at this time. The original medicine was called Desyrel, D-e-s-y-r-e-l. Now it's Norpramin, N-o-r-p-r-a-m-i-n. And he's given it in the, ah, recommended high level dosage.

He's also receiving a medicine called P-3. It's official name is El Triota Thiamine. That's an active form of thyroid, but it's given in micrograms. Not even in milligrams. Because it's extremely potent. Most people with thyroid trouble get ordinary thyroid,—but this particular kind seems to enhance the functioning of the other two. So he's getting—

Q. Is that then all the drugs that you—

A. We did give him at one time El Triptophane, which would help him sleeping. He had severe sleep disturbance, and that seems to be improving now.

Q. What, in your opinion, is his condition psychiatrically at the present time?

MR. GRUTMAN: That's objected to as irrelevant. The only thing that's relevant to the issue—

THE COURT: Well, it, it might go to the credibility of his testimony today. I'll let him answer it. All right. Go ahead.

DIRECT EXAMINATION CONTINUED

BY MR. DALTON

A. He improved dramatically about two (2) weeks ago. He started—which is very typical of people with this disorder. They can suddenly,—it's like a light comes on, either from manic depression, or from depression up towards mania. And many of the old qualities of their behavior return. It's not apparent to the lay person or to the stranger, but it is to the family. People who really know them see the difference. Otherwise, it may not be that clear.

But the person subjectively feels better. Mr. Flynt for the past two (2) weeks has improved.

• • •

[4/231-232]

Q. All right. What about the behavior or dissipating assets, giving—

MR. GRUTMAN: Now, Judge.

Q. Giving away those assets and his irresponsibility. Is that a symptom of mania?

A. Very—

MR. GRUTMAN: I object to that, Your Honor.

THE COURT: Well, I'll let him answer that. All right.

DIRECT EXAMINATION CONTINUED

BY MR. DALTON

A. It's extremely common. The, the classic manic gives away candy in the street, or gives away money in the street, sometimes it's giving away their car or buying, going on buying sprees, and then giving away the things as gifts. Of just amassing them. It's not at all uncommon to see frivolous behavior, and outrageous behavior vis a vis money, power, prestige. Sometimes reputations can be blown, depending on the, the kind of outrageous behavior in moments.

• • •

[4/247]

CROSS-EXAMINATION

Q. . . . Doctor, you say that Mr. Flynt is a psychotic?

A. Well, if you, if you leave the word "A" out of that statement, I would say he has, he is psychotic, in the sense that he is not always totally rational. He knows some of the realities of time, place, and person. But he does have some false beliefs. If they interfere with his functioning, I would call him psychotic.

• • •

[4/258]

Q. Did you not, and you therefore, from that answer knew, that besides Judge Marshall, a finding had been made by Judge Dwyer that Mr. Flynt was competent to stand trial. Correct?

A. Judges often do that to get somebody out of a prison, where they would sit until they become competent. That could be months or even years.

Q. I just asked for—

A. So they often say "Yes, they're competent. Go ahead with the trial." I believe everyone should have the right to a trial, and the sooner the better.

• • •

[4/268]

Q. He was competent, wasn't he?

A. When?

Q. In June of 1984, when he gave that deposition.

A. I think that he was highly disturbed, that he was delusional, and that he had false beliefs and that these

intruded consistently and repetitively, and they were very frustrating to all concerned. You don't have to be a psychiatrist to see that.

Q. But he was—

A. He had—

Q. —Competent.

A. —Flights of ideas. If you're talking about his competence as a witness, I say no, he's not competent. If your talking about his competence to stand trial, yes.

TESTIMONY OF KELLY GARRETT

December 7, 1984

[5/71]

KELLY GARRETT, a witness, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

• • •

[5/73]

Q. Did you attend any meeting of Hustler Magazine, at which the subject matter of that ad parody was discussed?

A. Yes, sir.

• • •

[5/74]

Q. Do you recall what was said about the ad parody at that conversation?

A. Yes, sir, I do.

• • •

[5/74-75] Q. Now, what was involved in that discussion?

A. Okay. Well, the principal protagonist in the discussion was the clerk of counsel, David Kahn. He had asked Mr. Flynt during that meeting to put in some sort of disclaimer pointing out that it was an ad parody. A good deal of time, and I would say for sure it was over an hour—possibly 2, maybe even 3, was spent arguing the point.

Q. What was the position of Mr. Flynt or the others who were against that?

A. Well, it was unanimous with the one exception of Mr. Kahn, that it was inappropriate to put any sort of disclaimer on it for reasons that—it was so obviously a parody that to call it—point it out as such would be superfluous, meaning it would be redundant—

THE COURT: Why would anybody object, though, to the extra baggage?

A. The reason why we did, we objected—and I was one of the principal objectors to this extra baggage—was that it had a detrimental effect on the impact of the humor of the ad, as has been mentioned in previous testimony, I couldn't help but hear sitting back there. When you point to a joke and call it a joke, it takes away from the joke. And since everyone in the room liked this parody and thought it was funny, and successfully as a parody, and the spirit of the magazine at the time was very enthusiastic—to do good stuff. Mr. Flynt had just returned from an absence,—the general opinion in the room was to not do anything that would take away from the impact of the parody. That's why there was that sort of objection to the excess baggage.

• • •

[5/76]

Q. Did anybody in the room voice the concern that a Hustler reader would take this ad parody as conveying truthful information about Jerry Falwell?

• • •

A. Nobody expressed anything of the kind.

• • •

CROSS EXAMINATION

[5/79-80]

Q. I gather that the idea for putting that little line "ad parody" was not Mr. Flynt's idea, am I right?

A. It wasn't proposed at that meeting by Mr. Flynt, it was proposed by Mr. Kahn, so I assumed it was not—

Q. The proponent was Mr. Kahn, not Mr. Flynt, am I right?

A. To put that disclaimer on, yes, sir.

Q. And in the course of the length of time that you were discussing that line that Mr. Kahn was vociferously suggesting be there, was there a consideration that perhaps Reverend Falwell would sue Hustler if this ad ran in its pages?

A. Mr. Kahn pointed out the possibility that that would happen, because it has happened before.

Q. And had it happened before? Are you speaking about Mr. Falwell suing?

A. Yeah.

* * *

[5/80-81]

Q. Mr. Garrett, you'd been working for Hustler Magazine or Flynt Publications for how many years prior to August of 1983?

A. Since August 1st, 1979. I guess that would be 4.

Q. So that's about 4 years?

A. Yes, sir.

Q. You said that everyone at the meeting thought the proposed ad was funny. In the 3 hour discussion, did anyone suggest that perhaps some people might not think it was funny?

A. No, sir.

Q. You mean everybody at that meeting thought it was hilarious that it should be suggested that Jerry Falwell committed incest with his mother, drank alcoholic beverages and got sloshed before he went into the pulpit? Is that what you're—

A. Everyone at the meeting thought it was funny. Let me amend my last answer. Everyone at the meeting did not necessarily say that everyone would think it was funny, but they did indicate that no one would take it as anything but attempted humor. That's—naturally, what's funny to one person isn't funny to everybody.

DEPOSITION TESTIMONY OF LARRY FLYNT*

Read into Evidence December 5 and 6, 1984

[3/123-124]

DIRECT EXAMINATION

DIRECT EXAMINATION:

BY MR. GRUTMAN:

Q. Mr. Flynt, what is your full name?

A. Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh. They call me Larry Flynt. And all those historical figures.

Q. Are you known as Larry Flynt?

A. No. Jesus H. Flynt, Esquire.

Q. Have you ever called yourself Larry Flynt?

A. Used to, but it was spelled with an "I" then. F-L-I-N-T. Now it's F-L-Y-N-T. I have two (2) birth certificates.

Q. Were you born in Kentucky?

A. No.

Q. Have you ever served in the United States Navy?

A. Hmm—I'm not sure.

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* The videotaped deposition of Larry Flynt was played for the jury on two occasions: (1) Plaintiff played an edited version of excerpts. (2) Defendant played the entire videotape. Page references herein are in all cases to the playing of the entire videotape (volumes 3 and 4 of the transcript) and, when applicable, to the edited videotape (volume 2).

Q. Have you ever lived in Dayton, Ohio?

A. No, I was hatched in Dayton, Ohio.

• • •

[3/125-126]

Q. You do not? Do you wish to pretend that you don't understand the question?

A. (Nods head.)

Q. Do you know where you are?

A. (Shakes head.)

Q. Do you know what day today is, Mr. Flynt?

A. (Shakes head.)

Q. Do you know who the man is to whom you pointed earlier and whom you said knocked out your tooth last night?

A. (Shakes head.)

Q. Are you determined, Mr. Flynt, to make a mockery out of this deposition?

A. (Nods head.)

Q. Do you wish to pretend that you don't understand my questions?

A. (Nods head, then shakes head.)

• • •

[3/127]

MR. ISAACMAN: If the witness needs a break, or he needs to consult a doctor, he's going to be allowed to do it.

MR. GRUTMAN: No. Listen, Mr. Isaacman, neither you nor I are doctors, but it is apparent to me, as I think it is to everybody in this room, that this witness is making a charade out of this deposition. And that with you and with Mr. Kahn, or with himself, he will resort to anything that he possibly can to pretend that he doesn't understand questions and to avoid meeting the requirements that Judge Turk imposed, that he answer questions.

Now, I'm not going to allow that to happen. I'm going to endeavor to ask this man questions. And fortunately, a videotape is being made, and people will be able to observe whether this man is what he pretends to be, or whether in reality he is shamming so as not to answer questions.

• • •

[3/128-130]

MR. ISAACMAN: —and if he requests medical attention, like any witness, he ought to be allowed to have it, and I say he should have it.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. Do you know who that man is talking?

A. He's an idiot.

Q. Do you know who it is?

A. He's an idiot.

Q. Do you know his name?

A. I've tried to fire him ever since he's been here.

Q. Do you know his name?

A. No, I don't know his name.

Q. You called him Alan a moment ago.

A. Yeah, Alan Graham. He's the guy with the sex tapex. I got a bedsore needs changed, and I need some medication, you know. Now if you want to get the medication for me, change my bedsore, and put me in the soft cuffs here so I can do a depression, I'll proceed.

But if you're going to treat me like a fool, I'm going to act like one.

Q. No, Mr. Flynt, we're going—

A. (Interposing) Mr. Grutman, you and I don't have a problem. Our problem is setting right over there, two of them. And you know the difference between them? One's a wet snitch, and one's a dry one.

Q. Who are you referring to?

A. Mr. Kahn and Mr. Isaacman.

Q. I thought you told me you didn't know his name.

A. I don't know him.

Q. You called him Alan Graham.

A. I don't know him. They're all the same.

Q. You know who I am, don't you?

A. Yep. You're an asshole.

Q. So you've said in your magazine. Not once, but several times, right?

A. Yeah.

• • •

[3/145]

MR. GRUTMAN: You and your client have obviously determined to turn this into a circus or some kind of a freak show.

• • •

[3/146]

Q. Mr. Flynt, are you aware that you are a defendant—

MR. ISAACMAN: (Interposing) No, no, no, no, no.

Q. — in a lawsuit entitled Reverend Jerry Falwell—

MR. ISAACMAN: (Interposing) I instruct you not to answer any questions of this man until I have the right on your behalf to examine Mr. Kaiser.

Q. — against Larry Flynt and Hustler, Incorporated?

A. I refuse to answer that question until we have addressed the issue of medical care. Now, I may be crazy, but I ain't stupid, Mr. Grutman.

• • •

[3/162 and 2/201-202]

Q. And everything that was published in *Hustler* magazine in those years was material that, at least, had to be submitted to you for final approval, isn't that true?

A. Everything that has ever went in *Hustler* should have had my approval, and anything that went in that did not have my approval, the son of a bitch is either dead, got the shit kicked out of him, or he's out of a job.

Q. Would that be true up to the present time, Mr. Flynt?

A. Ah, we're going to deal with the present time a little later. I haven't seen any of my magazines since I've been down here, with the exception of the January issue, and one other one that they let me see.

It's all part of their behavior modification program back here.

• • •

[3/162 and 2/202]

Q. Well, then, I take it from that answer, Mr. Flynt, that it is your testimony that surely through the November of 1983 issue, everything that went into that magazine had to have, and did have, your final approval?

MR. ISAACMAN: Object to the form of the question.

A. Everything that is ever went in did have, and has got, my final approval.

• • •

[3/165-166]

Q. For the moment, my interest is not about ionization, Mr. Flynt,—

A. (Interposing) It should be.

Q. —It's about your knowledge or awareness as a publisher of the potential liabilities for defamation. Was that something about which you had interested yourself prior to November of 1983?

A. Yes.

Q. And had you consulted on that matter, without telling me what they told you, but had you ever spoken to lawyers about it?

A. No.

MR. ISAACMAN: I'm going to object to that. That invades an attorney/client privilege.

Q. I didn't ask for the contents, just simply whether you'd had some discussion about it with a lawyer.

A. Yesh, with a lot of lawyers, but the discussion—

MR. ISAACMAN: Well, you're asking for the contents, I object to the question on the basis that it invades the attorney/client privilege.

A. The discussion that I'm talking about didn't take place with any lawyer, it took place with John Fitzgerald Kennedy, former president of the United States.

• • •

[3/169]

Q. Is there some connection between Vicki Morgan and Reverend Falwell?

A. Certainly is.

Q. You have any knowledge or information that there is some connection between Reverend Falwell and Vicki Morgan?

A. I do.

Q. What do you say that connection is, Mr. Flynt?

A. Well, let's just say that they were taking their orders from the same person indirectly. If you want me to expound on that, I will.

• • •

[3/170-172 and 2/204-206]

Q. In any event, Mr. Flynt, do you have any information that Reverend Falwell ever committed incest with his mother?

A. Yes.

Q. You do have that information?

A. (Nods head.)

Q. Who provided that information to you?

A. Captain Joe Sivley, Bureau of Prisons.

Q. Pardon?

A. Captain Joe Sivley, Bureau of Prisons.

Q. He told you that Reverend Falwell had incest with his mother?

A. Ah, no. Lieutenant White did, Lieutenant White works in Springfield. Okay?

And Lieutenant White also works for the Bureau of Prisons.

Q. Did you know Lieutenant White before the November, 1983 issue of *Hustler* was published?

A. No.

Q. Did you know Captain Sivley before the November, 1983 issue of *Hustler* was published?

A. Yes.

Q. When did you meet Captain Sivley?

A. We talked mostly on the radio.

Q. CB radio?

A. Huh? (What?)

Q. CB radio?

A. The lunchbox.

Q. Now, have you ever seen—

A. (Interposing) You know what a lunchbox is, Mr. Grutman?

* * *

[3/176-177 and 2/208]

Q. On the very top, it says "Okay". Are those your initials, "LF"?

A. I will not okay it unless it's been through the copy department, idiot. Now, it's my initials, I okayed every single word of it, but I didn't write a word of it.

Q. I didn't ask, for the moment, whether you composed it, I asked only if those were your initials. Are they?

A. Yes.

* * *

[3/179-180 and 2/210-211]

Q. Is that because you are indifferent to the consequences of publishing things about people which may not be true, if you accuse them of a crime?

MR. ISAACMAN: That's an argumentative-type question.

A. That's an argumentative—how in the world can I answer if you don't shut up, Isaacman?

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. From your study, or your interest in the law of libel as it affected publishers, did you know that it was—what did you know as to whether a publisher had the right to publish a statement which was false about somebody committing a crime?

MR. ISAACMAN: I'm objecting; it's irrelevant. The question is whether it was an intent to be a true statement or was intended to be a parody, that's the question.

A. I don't care, Mr. Grutman. I didn't care, Mr. Grutman.

Q. You didn't care?

A. Didn't care then, and don't care now.

Q. Okay. Do you care, Mr. Flynt, about hurting the feelings of people about whom you write things in your magazine?

A. Yes.

• • •

[3/181-186]

Q. What efforts did you make to ascertain whether the statements contained in Exhibit 1 were true or not before you caused it to be published?

A. Well, I met with Mary Calderon Waseka, and Masters and Johnson, Morton M. Hunt, Dr. James Prescott, who helped design and build this prison here.

And I know a lot about, you know, behavior modification, and I know a lot about the origins of violence, where

they came from, and that our inability to deal with out religious convictions was largely rooted in our inability to deal with our sexual pervasion, whatever it might be, or perversion.

But, as you and I both know, one man's perversion might be very well be another man's marriage.

And to get right to the point, and answer that question, so you could more clearly understand where I'm coming from, everybody knows I had a relationship with Ruth Carter Stapleton, but nobody knows what that relationship was.

And I'll tell you what it was.

Q. Please, Mr. Flynt.

A. I think it's very important.

Q. To answer my question?

A. Yes, to answer—

Q. As to what—

A. (Interposing) You asked—you asked if I had done any research, you may not have used those words, but you asked if I had looked in—to obtain any kind of evidence before I—

Q. As to the truth of what you published about Reverend Falwell in this ad?

A. Yes. And I'm telling you that what I did was I did an awfully lot of research, because every college campus that I ever spoke on, there was, you know, Gloria Steinman's (sic) dykes passing out flyers, you know, accusing me of every ill that society embodies, and I was really con-

cerned if *Hustler* in any way, or magazines like it, had any harmful effect on the consumption, whether it be—by what sex, or children, or animals, or whatever.

I had my own opinion, and I knew that it wasn't harmful in any way, but I felt that I needed to convince the government so that we might do away with the concept of obscenity.

So, what I did was I researched the sexual behavior, attitudes, and values of people like Mr. Farwell. I called them the Farwellians of the world.

And I had the support of the Federal government in doing this research, because they all work for me. Some of them lost their jobs, like Dr. James Prescott when he wrote the article on child abuse for *Hustler,* but he didn't care because he found another one.

And when Ruth Carter Stapleton came to me, it was part of my research program, and she says, "Mr. Flynt, you're going to have to say, 'bring Jesus into your life.''

And I told her, I says, "Ruth, say 'bring George, or John inside you' and it'll feel just as good."

And I opened up a copy of *Hustler* and she says, "Oh, my God."

And I says, "What you're doing, the inner healing that you're talking about is nothing more than sexual healing." Marvin Gaye sang about it, and a lot of people sing about it, you know, whether it be George Jones, Boy George, or whatever.

Now, you asked the question, and I'm demanding the time to answer it, and it's got to do with our sexual

values. And I am telling you that that is what it's all about.

Boy, you crawled out of one and you been trying to crawl back in one ever since, and eventually you're going to realize that.

And most of the people that work here in the B.O.P. already know that, and they already know that a few people's got to drink out of a commode over there with dome [sic] cigarette butts and shit in it, and it ain't going to be me.

Q. What specific information did you find out about Reverend Falwell committing incest with his mother prior to the publication in November of 1983? Would you please answer that question?

A. Ah, yes, I was—I'm on restricted mail correspondence here, and when I was in Springfield, I was not on restricted mail—

Q. (Interposing) Please, answer my question. You weren't here before November of '83.

A. Unh-hunh. (Yes.)

[3/184-186 and 2/212-214]

Q. I want to know what specific information you had prior to the November, 1983 issue of *Hustler* magazine that indicated, as a matter of fact, that Reverend Falwell had committed incest with his mother. Now, please, answer that question.

A. Okay. What you want, you know, is a document that's in my room over there. So, let the record reflect that I will testify about what's on the document and pro-

vide you with the names when Captain Sivley will permit you to take it with you.

Now, it's over there, and he says I can mail it out, but he's a damn liar, because they won't let it go out.

Q. Do you say you have a document in your room at the place where you are now, which answers the question I have just put to you, namely, the specific information which you found out prior to the November '83 issue, which indicated that Reverend Falwell as a matter of fact had committed incest with his mother. Is that what you're saying, sir?

A. Yes.

Q. It's in your room, now?

A. It is in my personal property.

Q. In your room, here, in this facility?

A. I never know what I'm going to find in my room when I get back there. It is a FCI Butner, and in the Bureau of Prisons. I am not trying to hedge the question, and you'll find a wedding band with it, and a pair of glasses that don't belong to Hinkley.

Q. Is it in your room, now?

WITNESS: Captain Sivley, is it in my room?

CAPTAIN SIVLEY: I don't know whether—

WITNESS: Ah, you going to have to depose him.

MR. GRUTMAN: All right, fine.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. Do you remember what specific information you had?

A. Yes.

Q. Well, tell me what specific information you had prior to the publication of November of 1983, that Reverend Falwell had committed incest with his mother.

Q. Ah, I have an affidavit signed by three different people from Lynchburg, Virginia—

Q. Yes.

A.—Okay, stating, okay, that purely and simply, that they had witnessed this act by Mr. Farwell.

Q. You have that affidavit?

A. Yes, I do.

Q. Where is it?

A. It's in my personal property here at FCI Butner.

Q. In your room?

A. Yes, or if it's not in my room, the Captain's got it. It's outside my room.

• • •

[3/187-196 and 2/215-216]

Q. Does anybody have a copy of this affidavit signed by three people whom you say, under oath, gave you an affidavit attesting to the fact that they witnessed—

A. (Interposing) You better believe they did.

Q. —Reverend Falwell—who has the copies?

A. Well, several people's got a copy.

Q. Who?

A. Okay, Attorney Joe Walsh in Dayton, Ohio, has a copy.

Q. Yes?

A. Now, Attorney Jerry Paul of North Carolina has a copy. Attorney Bill Kunsler has a copy, and Attorney Paul Ennis of North Carolina has a copy. And I'll send the whole world a copy, if they'll give me any goddamn stamps.

Q. Mr. Flynt, you know that that ad is the subject matter of this lawsuit, do you not?

A. Yes, I do.

[3/188-196]

Q. And you know that you are being defended by Mr. Isaacman and his firm, do you not?

A. (No answer.)

Q. Do you know that?

A. In this proceeding, yes, but I said in the beginning, let the record reflect I have been denied counsel of my choice, and access to the law library at FCI Butner.

Q. Have you produced a copy of this affidavit that you're referring to, signed by three people attesting to their having observed Reverend Falwell committing incest

with his mother? Have you provided that to either Mr. Isaacman or anyone connected with him?

A. Yes.

Q. Who?

A. Mr. Bill Willingham, Mr. Captain Sivley, Mr. Massenburg, and P. A. Kaiser over there.

Q. Okay. You have referred to the four functionaries of this institution who are sitting in this room while you are being deposed.

A. Yep.

Q. When did you give it to Captain Sivley?

A. Ah, when Robert Zonner, attorney Robert Zonner, Washington, D.C., ah, made his first trip down here, okay?

Q. Okay. When did you provide it to Mr. Willingham?

A. Ah, I provided it to Mr. Willingham at the time I was getting my root canal done in the dentist's office.

Q. All right. And to Mr. Kaiser, when did you provide it to him?

A. Hmm, Mr. Kaiswer's only seen it; I didn't—he's not allowed to touch my legal materials.

Q. If you provided it to these people, none of whom were your lawyers, why did you withhold it from Mr. Kahn or Mr. Isaacman, who are here in this facility, and whom you don't have to mail it to? Why did you not provide it to them?

A. Because after Captain Sivley seen what it was, he refused to allow Mr. Kahn and Mr. Isaacman into FCI Butner.

Q. Do you remember the names of the people who signed the affidavit?

A. I certainly do.

Q. What are their names?

A. I am not going to tell you, 'til you get the paper over here.

Q. Mr. Flynt, it's a relevant question, you promised to give me a true deposition—

A. (Interposing) I will not answer 'cause the boys are scared to death, okay?

Q. Oh, it was three boys?

A. Well, I don't know, we could check them and see.

Q. Do you remember the contents of the document?

A. Yes.

Q. When do you say the incest took place?

A. Ah, Farwell was very young.

Q. What's that?

A. Farwell was very young.

Q. Yes. How long ago was that?

A. Hell, I don't know what his age was.

Q. Well, since you've read this affidavit, which attests to having observed the specific incident, tell me what the affidavit says, so far as you recall, as to when this alleged thing occurred.

A. Okay, here's what the affidavit says to the best of my recollection.

Q. When?

A. To the best of my recollection, the affidavit says that Mr. Farwell was at the age of puberty, thereabouts, and that they caught him masturbating in an outhouse, looking at a picture of his mother in a Sears and Roebuck catalog.

Q. His mother's picture was in the Sears and Roebuck catalog?

A. No, he had it hid in the Sears and Roebuck catalog.

Q. I see.

A. You know how sometimes they buy *Hustler* and put it in the *Wall Street Journal*? I guess that's what Farwell was doing in the outhouse. And so these three boys, ah, used to tease him all the time about catching him playing with himself.

And they decided to watch him one day to see, you know, what he would do. And so, his mother caught him once, and she taught him a little about the birds and the bees, you know.

Q. Do these witnesses say that his mother had intercourse with him and they observed it?

A. Yes.

Q. Where did they say that it occurred?

A. I believe they said it occurred in Missouri, but I'm not sure. We'll have to check the document.

Q. Does the affidavit indicate how these boys who saw this were able to have observed this incident taking place?

A. Yeah, they were watching.

Q. Where were they watching from?

A. Through the window of the house.

Q. And they could see into the outhouse?

A. No, this happened—this—the first time was in the outhouse, okay, with the picture, you see. And he was only masturbating.

The next time, he was a little older, and it was in—it took place in the house.

Q. So these same boys who saw him masturbating with a picture of his mother in the Sears and Roebuck catalog, are the same people who saw him having intercourse with his mother, right?

A. Two of them are, the other one—

Q. Don't you think that's stretches credulity just a little further than anybody would swallow it?

A. What's credulity?

MR. ISAACMAN: I object, argumentative.

A. What's credulity, sir?

MR. ISAACMAN: Ambiguous.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. At the time that this ad was approved by you, nothing contained in this so-called affidavit was known to you at the time, is that correct?

A. Hmm, yes, it was known to me, I just didn't have the proof.

Q. My question is you didn't have any proof at the time that the ad was published to indicate—

A. (Interposing) I most certainly did, but I didn't have it in writing.

MR. ISAACMAN: I'm going to object to the characterizing it as an ad, it's a parody of an ad. If you refer to it as Exhibit 1, we won't have any problem.

WITNESS: Well, we can make it a real one now that we got the evidence, Isaacman. Just let him roll.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. When did you speak to these boys who made the affidavit?

A. Ah, at my house in Columbus, Ohio on or about, ah, January, 1978.

Q. And can you give me the names of those boys?

A. I can give you the names of one, okay.

Q. What's his name?

A. Charles F. Galbreath, okay. Now, he is going to be—he—the reason why I'm giving you his name is because he is a judge, okay.

From the State of Tennessee.

Q. Spell his last name for me.

A. G-A-L-B-R-E-A-T-H, Galbreath. Like John Kenneth Galbreath, okay.

Q. All right.

A. And he left the bench to come over here and find out what was going on. And he brought—Howard is one of the people's names, okay.

Now the other one's name is Moore, okay?

Q. Unh-hunh. (Yes.)

A. And now the other one's name is Mr. Massenburg, who's sitting right over there.

Q. Oh, he's one of the affiants himself?

A. Huh? (What?)

Q. Mr. Massenburg is one of the people who signed the affidavit?

A. Well, I had him down in the visiting room the last time to witness the third affidavit, and his signature is on it, because they won't mail the one out. They won't mail the real one out, Mr. Grutman. So I had to keep getting the same one notarized over and over again.

So, he can testify as to what's on that document, or he can go over to my room and get it.

Q. Okay. Would you tell me, Mr. Flynt, why, if this information about Reverend Falwell and his mother was known to you since 1978, you waited until 1983, to publish it to the world?

A. Ah, I was waiting to settle a score.

Q. I beg your pardon?

A. I was waiting to settle a score.

Q. To settle the—

A. To settle a score.

Q. Oh, to settle a score?

A. Unh-hunh. (Yes.)

Q. You mean you were trying to get even with Reverend Falwell?

A. Yeah.

Q. Has Reverend Falwell, to your knowledge, Mr. Flynt, ever made any personal remarks about your mother?

A. Hmm, no, but he did about my father, and that's no difference.

Q. Has he ever made any remarks about your personal sexual practices?

A. Yes.

Q. What do you say Reverend Falwell has said about your personal, private life?

A. He says it's abominable.

Q. What you personally do with Althea is abominable, he has said?

A. Hmm, my conduct is abominable, he says.

Q. Okay. Now you said a moment ago that you were waiting to even a—settle a score with him, is that correct?

A. Unh-hunh. (Yes.)

Q When you use that phrase, does that mean you were trying to get even with him?

A. Yep.

Q. So I take it from that, or those several answers, that when you published this, this was not intended to be a parody, it was intended to be the publication of the truth, right?

MR. ISAACMAN: Objection, it's argumentative, and it speaks for itself.

A. Yes. I didn't even want to put the word "parody" on there.

• • •

[3/199-203]

A. No.

Q. Who wrote the text?

A. Ah, well, I guess you would have to say that a group of people wrote it. Now, if you want me to give you the group of those people's names, I will.

Q. Is it your testimony, Mr. Flynt, that this text, which is on Exhibit 2, was not written by one person, yes or no?

A. It was written by one person with input. When you publish a magazine, unless you're God, you need some input from other people.

Q. Who was the person who composed the text, Bruce Helford?

A. Ah, no.

Q. Who?

A. Dr. Madalyn Murray O'Hair.

Q. You say Dr. Madalyn Murray O'Hair wrote the words that are in this Exhibit 2, and on Exhibit 1?

A. No, she submitted some documents which we complied them from. And I told Helford to compile the documents and to make the copy from the documents.

Q. So, now you're telling me that Madalyn Murray O'Hair submitted some documents to you?

A. Yes.

Q. Are those documents still in the possession of *Hustler*?

A. Yes.

Q. I call for their production.

WITNESS: Mr. Kahn, what you need is a copy of the letter that Richard Nixon wrote to Cardinal Cooke asking what he was going to do about the tuition tax credit on parochial schools and you'll find a copy of that letter in the file, and you'll also find a copy of the New York Police Department's report when John Lennon was murdered, and they went to Ronald Reagan to ask for a comment.

And he was in Cardinal Cooke's apartment, teaching Cardinal Cooke how to bite the big one.

You'll need a copy of that police report from the New York—

Q. What do you mean "teaching Cardinal Cooke to bite the big one"?

A. It's called Bravo Eleven and you don't have a high enough security clearance to talk about that.

Q. Well, what do you mean, Mr. Flynt?

A. Well, I—if the Captain will let me explain it to you, I will.

Q. Nobody's preventing you from explaining it, so tell us, what does "bite the big one" mean?

A. I have to have a radio, or a cord, or something. That's up to the Captain. If he wants to get—if he gets a line—if the Captain's got a box up there, if he brings it in here, I'll talk to Reagan on the phone.

Q. Okay. Now, Mr. Flynt—

A. Okay? Now, he's got a radio out there that he lets me use. If he'll bring it in here, I'll let you talk to Ronald Reagan. Now, you understand what I'm saying? And I ain't crazy.

Q. Were you present when this text that you approved was composed?

A. Pardon?

Q. Were you present when this text which you approved on Exhibit 2 was composed?

A. No.

Q. Was it composed by a committee?

A. Yes.

Q. Did they all meet together and write it up?

A. Yes.

Q. And who was on the committee?

A. Ah, Stephanie Ross, Greg Ross, Steve Sesadian.

Q. Anybody else?

A. Ah, yeah, Billy Idol, Yoko Ono.

Q. Yes.

A. And David Lee Roth and Ted Nugent.

Q. How about David Kahn?

A. Ah, no, he didn't have a thing to do with it. He tried to keep it from going in.

Q. You mean he thought that there was something wrong about doing it?

MR. ISAACMAN: Objection.

A. And a congressman, Larry McDonald, Congressman Larry McDonald, don't leave him out. And don't leave Jimmy Carter out of there.

And don't leave Bryan Huff out of there, neither. And don't leave Jean Reaves out of there. And don't leave Robin Barr.

Q. Is that your son or your wife?

A. No, that's his mother.

Q. I see. They're all on the committee that composed this text?

A. This is the mother I wasn't married to, this is the one that adopted him after the other mother sent him away.

"Cause see, Joseph Barr, Jr. is a nigger."

Q. He's a what?

A. He's a nigger.

Q. A what?

A. He's a nigger, but he's mine. You see what I'm saying? And I'm his natural father.

• • •

[3/210 and 2/223]

Q. Mr. Flynt, earlier today, you said that this Falwell Campari business was published when you were getting set to even a score?

A. Unh-hunh (Yes.)

• • •

[3/210-212 and 2/223-225]

Q. Do you believe that because of your aversion to the Bible and organized religion, that that gives you license to hold up to ridicule and scorn leaders of religious movements?

A. You're goddamn right.

MR. ISAACMAN: Objection. It's irrelevant. It's argumentative.

A. Free expression is absolute.

Q. It's absolute? Including the dissemination—

A. Unequivocably.

Q. Fine. Doesn't that include, Mr. Flynt, disseminating things about the private lives of religious leaders?

MR. ISAACMAN: Objection, It's irrelevant.

A. You're damn right.

MR. ISAACMAN: It doesn't relate to this proceeding.

A. I will drop a dime on my mommy.

DIRECT EXAMINATION CONTINUED
BY MR. GRUTMAN:

Q. You'll drop a what?

A. A dime on my mother.

Q. On your mother?

A. What that means is I am a wet snitch.

Q. A what?

A. A wet snitch.

Q. Okay. Have you also said, Mr. Flynt, speaking about your magazine, that "Parody has become so real, we're going to stop doing parody"? Have you ever said that?

A. Yeah.

Q. And the magazine that you spoke of that "we were going to stop doing it" in was *Hustler*. Right?

A. Yeah.

• • •

[3/216-217]

Q. Mr. Flynt, do you agree that there is a difference between contending vigorously, in a sort of debate, with people who have different ideas, and arguing about one concept, as against another, in distinction with making personalized attacks on the private lives of people with whom you disagree?

A. Mr. Grutman—

MR. ISAACMAN: Question is ambiguous and—

WITNESS: Shut up, Isaacman, Mr. Grutman

MR. ISAACMAN: I'm making an objection.

WITNESS: I understood his question. It wasn't vague. It wasn't vague.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. Please answer it.

A. Look, I'll answer this question the way you ask it.

Q. Right.

A. The truth is an absolute defense. And if it offends you or Jerry Farwell, then the two of you have a mental problem, not me.

[3/217 and 2/225]

Q. Let's see. Going down to Exhibit 1. Question, "Falwell: My first time was in an outhouse outside Lynchburg, Virginia," close quote.

My question is, at the time that you published this, did you have any proof that the first time Jerry Falwell ever had a sexual experience was in an outhouse, outside Lynchburg, Virginia?

A. Yes.

Q. What was the proof that you—

• • •

[3/218 and 2/225]

Q. Now, at the time that this appeared in *Hustler* magazine and you approved it, what proof did you have, specifically, that the first time Jerry Falwell had a sexual experience was in an outhouse, outside Lynchburg, Virginia?

A. I had an affidavit and a picture.

[3/218] Q. A picture of what?

A. But, I had a veriable affidavit.

Q What was the picture of?

A. It's in my property.

Q. What did it depict?

A. It is in my property.

• • •

[3/219-221]

Q. What did the photograph you referred to show?

A. Okay. Now, I'm telling you that there's several photographs back there, okay, in my property. Okay. And you can see them all.

And believe me, Farwell is one of them. Okay. And Pat Boone is another one. Okay.

Q. What did it show of Falwell?

A. I am not going to discuss what people's sexual preferences are. But, I tell you I have got a photograph of Jerry Farwell masturbating. And I've got a photograph of him fucking some young girl.

Now, if you want them, you're going to have to get them from the Captain.

Q. You say you're not going to discuss the privacy of people's sexual practices, Mr. Flynt? What do you think you were doing in this ad?

MR. ISAACMAN: Objection. Abusive.

A. It involves children, Mr. Grutman. It involves children.

MR. ISAACMAN: Objection to the abusive manner of Mr. Grutman's asking that question.

A. I will talk about adults, but, remember, when you invade the privacy of someone that is not old enough to speak for themselves, you're violating the rights of somebody who don't have any rights. That's children.

And it's called an individual liberty. And no one has the right of taking the individual liberty of sticking their sexual organ in some child's mouth.

Now, there's a big difference between civil rights and individual liberties. And you should learn the difference.

I mean, an individual liberty is something I'd like to do right now; take a shit right on top of your head.

But, now, civil rights is what these assholes over here are doing to me now. They're violating my civil rights, by making me stand here and ask you to insult my intelligence.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

[3/221 and 2/226]

Q. I understand that as a champion of children, you said what you did. But, do you think that, with respect to adults, you can say anything that you want about their private sexual activities, whether it's real or fancied, or not?

A. Yes.

Q. No matter how horrible it may be to the average, ordinary person?

A. Yes.

Q. And you think you can do that in a magazine, and get away with it, don't you?

[3/221-222]

MR. ISAACMAN: Objection. It's irrelevant and argumentative.

A. Yes.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. As a matter of fact, what you just described is something that you and *Hustler* have been doing for years, haven't you?

MR. ISAACMAN: Objection. Irrelevant and argumentative.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. Haven't you?

A. You're goddamn right. You can take that to the bank, Mr. Grutman.

Q. And you love it, don't you?

MR. ISAACMAN: Objection. It's irrelevant and argumentative.

A. I hate it, boy.

• • •

[3/222-225]

Q. I see. Now, the next thing says, "Wasn't it a little cramped?" Answer, "Not after I kicked the goat out," close quote.

You got any proof of that?

A. Yeah. His—the first time was a sheep.

Q. You got a photograph of Reverend Falwell having coitus with a sheep?

A. Yes, I have.

Q. You do? Where's that photograph?

A. I really have. It's in my property.

Q. And where is that physically located?

A. Captain Sivley's got it. It's here at FCI-Butner. And believe me, it's not in Springfield. It's here.

Q. Okay. Let's continue. It says, "Interviewer: I see. You must tell me all about it." And quoting Falwell in this ad, quote, "I never really expected to make it with Mom."

By the way, does the word or the phrase "make it" mean have sexual intercourse?

A. Yeah.

Q. Okay. "But then after she showed all the other guys in town such a good time, I figured, "What the hell!" close quote.

MR. ISAACMAN: Objection to the form of the question. It is not an ad. It's a parody of an ad. And it also doesn't quote Falwell.

A. Now, see, you're talking about the sheep there, Mr. Grutman.

MR. ISAACMAN: It has "Falwell," with some language following it.

Q. I'll read this to you again. Quote—I'm reading it exactly—

A. I heard it.

Q. Fine. Then, I ask you, from that language, does that not convey the notion that Mrs. Falwell, Reverend Falwell's mother, was a promiscuous woman?

A. No. He was referring to the sheep, Mr. Falwell. He was screwing the sheep, at that time. See, he said he had to kick the goat out first.

Q. But, then it says, "I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, 'What the hell!' "

Are you telling me "guys" means sheep?

A. No. She was having an affair.

Q. With whom?

A. Hunh?

Q. With whom?

A. I don't think we should discuss that.

Q. No. I want to hear it from you, Mr. Flynt. Who do you say Reverend Falwell's mother was having an affair with?

A. Look, I'm not going to give the name. You can get it from Charlie Galbreath or Robert Barr. I am not going to give out the name. Or you can get it from Lieutenant White or Captain Sivley.

I'm through wet snitching today.

Q. I put it to you, Mr. Flynt, that you are making this up. You had no proof of any such thing.

A. You wanna bet?

Q. I'm asking you now.

A. If I ain't crazy, why would I make this up?

Q. Because, Mr. Flynt, you're an utterly irresponsible, arrogant, truculent, demented, deranged person.

MR. ISAACMAN: Objection. Objection. You're not testifying here, Mr. Grutman.

MR. GRUTMAN: I was asked a question, and I've answered it.

MR. ISAACMAN: You're not testifying here.

MR. KAHN: You're supposed to be sworn first, Mr. Grutman.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

[3/225 and 2/228-229]

Q. Mr. Flynt, did you, before this ad was published, did you have any evidence, specifically, that Mrs. Falwell, Reverend Falwell's mother, had ever committed adultery or been a promiscuous or lascivious woman, with other guys?

A. Yes.

Q. What was that evidence?

A. A tape recording.

[3/225-227]

Q. Who gave you the tape recording?

A. Mr. Addison Lighthall, with the FBI.

Q. Addison Lighthall? Who's he?

A. He's been undercover with the FBI, for about twenty-four years.

Q. Twenty-four years with the FBI? Did he ever have anything to do with you?

A. Yes.

Q. What did he do for you?

A. Hunh?

Q. What did he do for you?

A. He bought the farm.

Q. What does buying the farm mean?

A. Ah, well, I understand he placed a tap on Bill Ryder's phone and Gordon Novel's phone. And I understand he loaned a three-way tap to Rogers Kirk.

Q. This man gave you a tape recording of Mrs. Falwell, The Reverend's mother? Tell me what was on the tape recording?

A. It was your voice, Mr. Grutman.

Q. My voice? And what was I doing on the tape recording?

A. You was talking to Rogers Kirk.

Q. Who is Rogers Kirk?

A. He's a photographer in Los Angeles.

Q. Was that in connection with Jackie Collins?

A. Yes, Mr. Grutman, it was.

Q. Now, I'm not asking you about Jackie Collins. I'm asking you about a tape recording which you told me that you claimed to have, indicating that Reverend Falwell's mother was an adulteress.

A. Yep.

Q. Did you get such a tape recording?

A. Sure have.

Q. Where is it?

A. Lieutenant Stanley's got it.

Q. Lieutenant Stanley. Does he work for Captain Sivley?

A. Yeah.

Q. I see.

A. He confiscated it from my room.

• • •

[3/228]

Q. What was on the tape recording?

A. Well, there's several of them. There's several hours of them, both video and audio.

Q. Mrs. Falwell, Reverend Falwell's mother, on a videotape?

A. No. I'm sorry. She's on audio.

Q. On audio. What is she doing on audio?

A. She's talking.

Q. To whom?

A. She's talking to a friend.

Q. And what is she saying?

A. She's talking about her son.

Q. When was the recording made?

A. I do not have the date on the recording.

Q. Was it made by Addison Lightall?

A. Yes.

Q. Under what circumstances did he gain access to Mrs. Falwell's proximity, so that he was able to make this taped conversation?

A. When he went to work for me.

Q. When did he do that?

A. He went to work for me in 1977.

Q. Are you sure of that?

A. Positive.

• • •

[3/229-230]

Q. No. I'm asking what proof you had about Mrs. Falwell, the Reverend's mother, having been a wicked and loose woman?

A. She was just saying that she wasn't—that his father wasn't really his father. That's all. That he was a bastard.

Q. Mr. Flynt—

A. I'm under oath, Mr. Grutman.

Q. Yes, I know, Mr. Flynt. I wonder whether you do.

A. And I'm not crazy.

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[3/230-234]

Q. When you got a tape recording of Mrs. Falwell, the mother of Jerry Falwell, proving that he was an illegitimate person, and that she was a lascivious woman who was an adulteress, considering the gripe that you had with Mr. Falwell for as long as you profess to have had it, would you tell us why you waited until 1983, before you disclosed it?

A. Because I wanted to run for president.

Q. Have you ever offered this tape to the world at large?

A. Ah, yeah.

Q. You sold certain DeLorean tapes to CBS, didn't you?

MR. ISAACMAN: Objection. Irrelevant.

A. I didn't sold them. I gave it to them.

Q. Fine. Did you ever give these tapes of Mrs. Falwell to any media?

A. I certainly did.

Q. Who?

A. Miss Aviva Diamond, ABC News.

Q. When did you give it to Aviva Diamond?

A. On or about November 1st.

Q. What year?

A. 1983.

Q. This is a tape, an audio tape, of Reverend Falwell's mother, stating in words or substance that Jerry Falwell is an illegitimate child, and that she was a woman who fornicated with other men?

A. No. It's a tape of Addison Lighthall speaking with Fred Fielding, about Mr. Farwell. And he's also talking to Mr. Don Penny about Mr. Farwell. And Rudy Maxxa is on the tape, too.

And Mr. Grutman, I will produce these tapes for you, if you'll stay in North Carolina tonight.

Q. Where are they?

A. I tell you what, you let—

Q. Where are they?

A. —me know what hotel you're at, and they'll—

Q. I'm staying right here. Where are they?

A. Okay. I have got copies in a—in the Federal Bank Depository, in Los Angeles. Okay. And I can get in there.

Now, Mr. Kahn, if he was telling me the truth, David Kahn, not Ken Kahn, if Mr. David Kahn was telling me the truth in his Mailogram, that my property—certain parts of my property in California, that is, not my property that's here, but my property in California is back in my house.

WITNESS: Is it back in my house, Mr. Kahn? I am talking about the tapes, Mr. Kahn, the video and the audio tapes, because I made plenty of copies of them.

And I put some in your mother's safety deposit box, and some in Bill Ryder's wife's safety deposit box.

He thinks he's holding the royal flush, but we know who's holding it, don't we, Mr. Kahn?

Now, where is the tape at, Mr. Kahn, because I gave it to you? And you seen it. And you listened to it.

And I'm talking about the video tape of Mr. Reagan, not Mr. Meese, because Arthur Barrons has got the Meese tape. But, you've got the audio tape between Jerry Falwell and Don Penny, and Rudy Maxxa, and Ronald Reagan.

And you know goddamn good and well what it was, because I put you on the phone, and you talked to Mr. Don Penny on the phone. And you told Mr. Don Penny to leave me alone.

MR. GRUTMAN: I call upon Mr. Kahn to produce the materials.

MR. KAHN: I know of no such materials, Mr. Grutman.

WITNESS: You are lying, Mr. Kahn. You are lying. And if Mr. Kahn does not want to produce it, Captain Sivley or Lieutenant Stanley will produce it.

Do you think—hey, both of them guys are Americans. And they both fought in the war. And they have no intentions of leaving the country. Besides, do you think they could outrun a subpoena.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. Mr. Flynt, if Mr. Kahn is a liar, and won't do your bidding, even though he's one of your lawyers, will you authorize Captain Sivley or Lieutenant Stanley to allow me to go into your room with you, after we finish this deposition?

A. I certainly will.

Q. And will you deliver to me the materials which you've told me so far are in your room?

A. I certainly will.

Q. All right. Then we go on further. "Interviewer: But your mom? Isn't that a bid odd? Falwell: I don't think so. Looks don't mean that much to me in a woman."

A. Can we interrupt the proceedings one second?

Q. Sure. Yeah.

WITNESS: David Kahn, me and Mr. Isaacman will handle things. Will you go call the law firm of Gaither and Nolan, and tell them to call Paul Ennis, and tell Paul Ennis to bring the Bell papers and the Ed Meese package, and have them here by the time depositions are finished. Okay?

And Captain Sivley will arrange for a viewing, in some room here in the prison, either in my room or here. Okay.

And we'll also arrange for the audio tape to be played, as well. Okay?

MR. KAHN: Larry, we're going to probably be taking a break. So, you want to wait until then?

WITNESS: No. We don't need you here for this, Mr. Kahn. You go make the call. And call Gaither and Nolan, you know. And do you know how to say "Code Pink"?

MR. KAHN: Yes, sir.

WITNESS: Tell them who bought the farm, Mr. Kahn.

• • •

[3/235-239]

Q. What proof did you have that Reverend Falwell has ever gotten drunk?

A. Congressman Robert K. Dornan told me. So did Congressman Bill Keating. So did Charlie Keating. And so did Eugene Smith. And so did Attorney Larry Stirts. And so did Attorney Charlie Capps. And so did Judge Simon Lease, and so did Fred Kartilano, the prosecutor in Cincinnati.

Q. They all told you this, before November?

A. And so did Brian Huff, the prosecutor in Georgia. And so did Mr. Rhodes, the prosecutor in Atlanta. You know Mr. Rhodes, don't you?

Q. They told you that?

A. Yeah.

Q. Leonard Rhodes?

A. Leonard Rhodes told me that. Do you know Leonard?

Q. Yes, I do.

A. Good man. You think he'd lie?

Q. I don't know that he said what you said.

A. If he said what I said he said, can we take it to the bank?

Q. What makes you think that Reverend Falwell ever drank Campari, ginger ale and soda?

A. Mr. Salisbury told me so.

[3/236-239 and 2/231]

Q. And this sentence, "And mom looked better than a Baptist whore with a hundred-dollar donation."

Who wrote those words?

A. Mr. Bruce Helford.

Q. Do you think those words are true?

A. Yes.

Q. Do you think that if they were false, and somebody read this his mother was characterized as a whore, that that would be a hurtful thing to him?

A. If it was—

MR. ISAACMAN: Objection. You're assuming it was intended to be true?

A. If it was true, I don't think it would hurt.

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

Q. But, if it were false?

A. If it was false, I think it would upset Mr. Falwell very much. But, if it was true, I don't think it would.

Q. Did you want to upset Reverend Falwell?

A. Yes.

Q. Evening the score?

A. Yes. But, I was telling the truth.

[3/237-239]

Q. "Interviewer: Campari in the crapper with Mom —how interesting. Well, how was it? Falwell: The Campari was great."

Do you remember the next line?

A. "The Campari was great." But, something about the odor?

Q. No. "But Mom passed out before I could come."

Does the verb "come", in that context, stand for ejaculate or have a climax?

A. Yes.

Q. What proof did you ever have that such a thing took place?

A. Well, you see, Farwell's—Farwell's mother had been drunk the night she got pregnant with him. That's what it was, you know, so it was just taking a little bit.

Q. This talks about, not the night that he was conceived, this talks about incest between someone who is post-pubescent and his mother.

A. Oh, no. We're talking about the goat, now. You forgot to double back, Mr. Grutman.

Q. "Mom passed out before I could come."

A. Yeah. He was fucking the goat—the day she caught him fucking the goat once. That's in the affidavit. You see what I'm saying?

Q. No. I don't.

A. Well, they had some animals on their farm. So, when Farwell was a little boy, he got caught by his mother, once masturbating, and another time, screwing some of the animals on the farm. You know, I mean, you opened up this can of worms. I didn't.

Q. Do you have any photographs or tape recordings which were in your possession, before you caused this thing to appear?

A. Certainly do. They're in my room. And I give Captain Shivley permission to let you go in there and get them.

And you know what? He ain't going to say no. He's going to let you have them.

Q. Can we do that during the lunch period?

A. We certainly can.

Q. Thank you. Let that be clear. I'll do it during the lunch period. I'm almost finished with this, and then we can take the lunch.

"Campari in the crapper"—well, we've done that.

"Interviewer: Did you ever try it again?"

What does the antecedent of "it" refer to?

A. I mean did he ever try the goat again.

Q. Oh, goat. I see.

A. Okay.

Q. It doesn't refer to his mother?

A. Yeah. But, he never—it had happened several times with his mother. But, it was with the guy that she was having the affair with.

Q. Who was that guy?

A. Hunh?

Q. Can you identify her paramour?

A. Yes.

Q. Who?

A. Galbreath.

Q. Galbreath?

A. Yeah. He'll tell you. That's not the name, but I mean, he'll give you the affidavit.

Q. No. You tell me the name. Who is the person—

A. I don't remember the name. But, does it make any difference? As long as I'm telling the truth, does names and dates and places really matter?

Q. And of course, if you're not, Mr. Flynt—

A. I'm in a world of trouble, ain't I?

Q. You bet.

A. Okay.

Q. You bet. Take that to the bank.

• • •

[3/240-241]

Q. Anything else in there so far that we've covered, which you contributed to, if not entirely advanced?

A. Well, Howard, who's a friend of Pat Boone's, the one guy I got the affidavit from. And another one is a former governor of Tennessee. Okay.

WITNESS: And Isaacman, he's the guy that was at my house with John Pauley. And he's doing two years now, with that congressman, with Jenrette's husband. They're down at—I think they're down at Eglin, or somewhere. You know what I'm saying?

So, what you're going to do, is you're going to have to call Charlie Galbreath, you know, and get Howard's number. And get the governor of Tennessee, you know, the one that introduced me to the guys that knew Falwell's friends that gave the affidavit.

MR. GRUTMAN: Okay.

WITNESS: You know what I'm talking about? You understand—do you know who Mr. Galbreath is?

MR. ISAACMAN: No.

WITNESS: He is a Supreme Court Judge from the State of Tennessee. He left the bench to come over here and help me with my problems, because you couldn't get out of California.

And his address is 901 Stallman Building, Nashville, Tennessee. And he's in the phone directory.

Q. I take it, then, from what you—

WITNESS: Now, do you think you could call him and get a copy of that affidavit?

MR. ISAACMAN: (No response)

DIRECT EXAMINATION CONTINUED

BY MR. GRUTMAN:

[3/241 and 2/233]

Q. Mr. Flynt, I take it, then, from what you're telling me, that this publication about Reverend Falwell and Campari was not intended to parody or exaggerate anything, but to convey the truth. Is that right?

A. Yes, sir.

• • •

[3/243 and 2/234-235]

Q. And didn't it occur to you that if that wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time that you wrote "okay," or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment

and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.

• • •

[3/245-246]

Q. That's Judge Larkins?

A. Judge Larkins. He sent it back and wouldn't open the envelope, because I wrote him a letter, and told him it was coming. And I told him how I got it into the penitentiary.

I brought it in by my daughter, Judith Elaine Flynt, whose natural father, natural father, is John Fitzgerald Kennedy. Natural father.

She's got two different birth certificates. And the footprints are in the snow.

And she hired an attorney named Mr. Manning. And he came in to tell me I was in the wrong state. And I reminded him I was in the right state, when I gave him Jesse Helm's bank account. It's under the name of Western Goals, in Grand Cayman Islands. Do you understand?

Q. Right.

A. Now, I put the tape that you want in an envelope to Judge Robert Tagasugi. And I sent it to the Federal Courthouse, in Los Angeles, California. I had marked on

the letter, "To be opened in the presence of the inmate." Special mail, legal correspondence, privileged correspondence.

The BOP deliberately opened up that package, and took the tape out of there. And they took a lot of other documents out of there that are pertinent to what we're doing here involving Mr. Farwell, because the affidavit that I have from the people in Virginia is a real affidavit, by real persons.

And I have a court order in those proceedings that says that the Bureau of Prisons can put whatever limitations that they want on these depositions. Now, what they're doing is they're putting every limitation that they possibly can on them, so they can try to go home tonight.

But, if you do your job, none of them will go home, we'll get Mr. Sam Samples, or Dr. Sam Samples held in contempt.

And believe me, Dr. Sam Samples has a name, and so does every other asshole in here that's been violating my civil rights since I've been here.

* * *

[3/247-249]

MR. GRUTMAN: Did you cause a search to be made of Mr. Flynt's room?

MR.WILLINGHAM: Yes.

MR. GRUTMAN: When you say you're the case manager, does that mean that this person is under your jurisdiction?

MR. WILLINGHAM: I provide casework type services to him. Yes.

MR. GRUTMAN: Okay. Did you find any videotapes back in Mr. Flynt's room.

MR. WILLINGHAM: No. I did not.

MR. GRUTMAN: Did you find any audio tapes back in his room?

MR. WILLINGHAM: No.

MR. GRUTMAN: Did you find any photographs back in his room?

MR. WILLINGHAM: No.

MR. GRUTMAN: Specifically, photographs involving Mr. Falwell having sexual intercourse with his mother?

MR. WILLINGHAM: No.

MR. GRUTMAN: Any boys?

MR. WILLINGHAM: No.

MR. GRUTMAN: Or any animals?

MR. WILLINGHAM: No.

MR. GRUTMAN: Or masturbating?

MR. WILLINGHAM: No.

MR. GRUTMAN: Did you find any affidavits or copies of affidavits attesting to that fact Mr. Falwell had had incest with his mother, or was observed by anyone to have been masturbating, by looking at a picture of his mother in a Sears Roebuck catalog? Did you find such a thing?

MR. WILLINGHAM: I asked Mr. Flynt for items that would pertain to this hearing. And he gave me a stack of legal materials here. And I've brought those up here.

MR. GRUTMAN: Okay. Well, we'll look at those later on.

WITNESS: Will you have Mr. Willingham bring them over here, so I can get you what you want?

MR. GRUTMAN: All right.

WITNESS: Bring them over here, Mr. Willingham.

MR. ISAACMAN: Mr. Kahn reviewed those materials. And I'd like Mr. Kahn to indicate—

MR. KAHN: In Mr. Willingham's presence, approximately a couple of minutes ago, I went through the entire stack of documents in front of him.

And while I did not read any of the letters or documents in the thing, there were—every document I reviewed in front of Mr. Willingham. And there were no affidavits, and there were no photographs of any kind. There were no tape recordings of any kind. There were no tape recordings of any kind, or anything like that.

WITNESS: You're a liar, Mr. Kahn.

MR. KAHN: Well—

WITNESS: You're a liar, Mr. Kahn.

MR. GRUTMAN: Mr. Kahn, were there any documents relating to Reverend Falwell?

MR. KAHN: None that I saw.

WITNESS: Did you open all the envelopes, Mr. Kahn?

MR. KAHN: No. I did not open all the envelopes.

WITNESS: Then, Mr. Kahn, would you mind handing me the paper?

• • •

[4/6 and 2/237]

Q. Do you realize, Mr. Flynt, that you can injure people by inflicting mental suffering and disturbance on them, that will cause pain that is as great or greater than physical suffering?

A. You goddamn fucking right. And you're all going to be on your knees, before we finish here.

• • •

[4/10-12]

Q. How about his daughter? Do you say he made any threats on your daughter Tonya?

A. Did he what? No. He had nothing to say about Tonya.

Q. Besides—

A. Excuse me a minute.

Captain Sivley, you told me if I behaved, those cuffs wouldn't go back on when I got back over there. Now, when I went back over there—and I want you to write this down—he assaulted me, and he put the cuffs back on.

And the reason why he assaulted me is because I told the truth over here. And you guys took me back over, saying I was acting crazy.

Q. Mr. Flynt, apart from—

A. And they did not let me eat when I was back there. They would not let me go to the bathroom. But, everybody was doing their little behavior modification. Like, the dentist was there, ready to put my tooth back in again, which he knocked out the other night, Mr. Kaiser, because I refused to eat the food and drink the water.

You know the reason why? Because there's nine letters that Captain Sivley has, but I got three more I want to show you from Mr. Paul Ennis, my attorney, postmarked Atlanta, where they were threatened to poison my food.

You see what I'm saying?

Q. Mr. Flynt, we are—

A. My life's in danger, not yours, asshole. Okay? And you just let me finish. You come here to take these depositions today, but don't interrupt my statements or my answers. I'm not asking questions; I'm making a statement.

Q. How about answering questions?

A. Now, Captain Sivley knows who sent those letters threatening to poison me.

Q. Mr. Flynt—

A. He knows every person in here who has assaulted me. And he will tell the truth, if you put him under oath. Now, we've got to get to the medical question here on this. And I haven't told one single lie.

Sometimes I talk in parables and make jokes, because you have to maintain your sanity in any goddamn fucking proceedings like this.

Now, do you people understand what I'm trying to say?

• • •

[4/22-24]

Q. ... I want you, while you're on camera, to find the Fielding envelope which you just referred to in answering my question that within the Fielding envelope would be found the certification authenticating forensically that the photograph of Jerry Falwell and Warren Burger in fellatio is an authentic photograph.

Now you find that one for me, and then I'll take your whole grab bag.

MR. ISAACMAN: I have an objection to your taking his whole grab bag.

MR. GRUTMAN: He's offered it to me.

MR. ISAACMAN: I understand, but I don't think—I don't think he's—I don't think he's competent to make that decision.

WITNESS: The hell I ain't competent to make it. Just watch me.

Why did you take the envelope addressed to Mr. Fielding?

MR. KAHN: I didn't take anything. Mr. Willingham, you saw me review it, one at the time, and you saw I did not open anything and did not take anything.

A. Well, Mr. Grutman, I had a copy. I'll make a copy of everything.

Q. You've got it? Open it up. Just open it up on camera while the videotape is rolling. Please open that. And the winner in California is —

A. (hands document to counsel)

MR. GRUTMAN: Let the record reflect that the witness has just flung over to me a document from the United States District Court, Central District of California, which is captioned "The United States of America against Larry Flynt," Case number Criminal 83-979-CBN, the title to which document is called, quote, "Ex Parte Application for Modification of Commitment Order and Request for Transfer from Springfield, Missouri, To Terminal Island, California," pursuant to 18 U.S. Code, Section 4244,

• • •

[4/25-26]

Q. I'll take that.

A. Give me—I want to mark this one.

Q. I can't interfere with the procedures here.

A. Give me a pencil. I'm not giving it to him without my initials on it, Mr. Willingham, may I borrow your pen?

MR. ISAACMAN: I am raising an objection to his turning over any documents that counsel does not approve of, and my objection is that he's not competent to make that determination. He's represented by counsel—

WITNESS: (Interposing) Oh, I can prove to you I am competent.

MR. ISAACMAN: —Counsel rules, counsel has indicated that those documents should not be turned over. And so I request that, Mr. Grutman, you not review these

documents that he's turning over without counsel's consent until a court makes a determination on his competency.

WITNESS: Hey, Mr. Grutman, we got the goods on them. Just take this. I'll fire some more your way in just a minute.

MR. KAHN: All right, Mr. Grutman, I'm also telling you that there have been a number of courts which have indicated that Mr. Flynt's not competent. And that you're reviewing those documents without his counsel seeing them.

WITNESS: These aren't the ones that were in the envelope. He's a liar, Mr. Grutman. These were the ones outside the envelope.

• • •

[4/27-31]

Q. (by Mr. Grutman) Now, I've marked these various documents, Mr. Flynt, and none of them appear to be what I asked for. Namely, where is the forensic certification as to the authenticity of the photograph of Warren Burger and Jerry Falwell in fellatio?

A. Would you let the record reflect that I will produce that affidavit before the conclusion of these depositions?

Q. You told me it was among the papers—

A. (Interposing) Then, fine, let me take time to find it. If you want to proceed—

Q. Fine, I'll give you all the time you want.

A. Fine, okay.

Q. You don't have to do it right now, Mr. Flynt.

A. Okay, well, right here. I think you might want to depose Captain Sivley.

Q. Fine. No, you hold on to that. You hold on to—

A. (Interposing) Here it is, here it is.

Q. Here is what?

A. Here it is.

Q. Here is what?

A. (Hands paper writing to counsel) Read it. You've got my permission to read it.

Q. It's the last document I'm going to look at, waste time—

A. (Interposing) Look at it, look at it.

Q. Okay.

MR. KAHN: Mr. Grutman, I really think, you know, you've already been informed as to the fact that Mr. Flynt's represented by an attorney, and his attorney has indicated that he—

MR. GRUTMAN: (Interposing) All right, this will be Exhibit No. 9 (sic). It's apparently a request made to Captain Sivley.

MR. KAHN: —he wishes to view these documents, and never—

MR. GRUTMAN: It is dated April 3, 1984, and it reads as follows: "I request a video monitor and a VHS video recorder for the purpose of viewing the Vicki Morgan sex tapes featuring Ronald Reagan, Edwin Meese, Senator Paul Laxalt, Bill Casey, William French Smith, Barry Goldwater, Jr., and a lot of other celebrities and politicians.

Vicki Morgan and three FBI agents have been killed over the tapes.

"Make the equipment available, and I'll have the tapes here in twenty-four hours, or give me a BP-9." Close quote.

(Plaintiff's Deposition Exhibit 8 Marked For Identification)

Q. (by Mr. Grutman) Among the people you mentioned, you didn't mention Warren Burger or Jerry Falwell by name, did you?

A. I'm not God, Mr. Grutman. I couldn't manage to get them all on tape. But the ones I haven't got, the law firm of Gaither and Noland in Springfield, Missouri, have. And not only there are copies there, Dr. Madalyn Murray O'Hair has copies. Dick Gregory has copies. Don Hewitt had one copy. He had the fake one.

Q. I read you—

A. (Interposing) He had the one faked by Bill Ryder and Gordon Novel, and I want to know if David Kahn had anything to do with that tape.

Q. The next one reads—

A. (Interposing) And Mr. Grutman, Jeff Steinman—

MR. ISAACMAN: You understand, Mr. Grutman, I have an objection to each one of these documents.

A. —and there's a nice little Jewish boy named Jeff Steinman. I think if I was you, I would talk to Jeff Steinman and Tom Loflin and Stokely Carmichael, and you know who I gave a copy of the real Ed Meese sex tape in color to, and the Bill Casey one in color to, and the Jerry Farwell one, which is in color—see, you can fake a black and white tape if you're smart enough, cause some of the Abscam tapes were faked.

But the color tapes you can't fake, because they show the sweat and the pores, and they show the blood, and they show everything. I gave Mr. Marlon Brando a copy, and he has advised me by telephone that he would be happy to make it available to you.

Q. All right.

A. Mr. Tom Loflin has a copy, and I arranged a screening over at Mr. Loflin's house and showed the Jerry Farwell tape and the Ronald Reagan tape and the Ed Meese tape to Mr. Clifford Pearlman, and he had his wife with him, Mr. and Mrs. Clifford Pearlman.

• • •

[4/32 and 2/240]

Q. And I take it that you wanted to embarrass Chief Justice Burger and Reverend Falwell, didn't you?

A. Damn right.

Q. It wasn't a parody. You really intended to hurt them, didn't you?

[4/32]

A. You're goddamn right. That attorney there, Mr. Grutman, Mr. Mitch Basker, he's handling negotiations with the White House on these tapes.

Now you know, when you first make this word public, they'll say I'm lying and then they'll say I'm crazy. And then we'll teach how to double back, Mr. Grutman.

• • •

[4/46-54]

Q. Did you—let's see, December 1981. Were you aware that in the publisher's statement, Reverend Falwell and the Moral Majority were again adversely referred to in the pages of *Hustler?*

A. Yes.

MR. GRUTMAN: I offer that as the next numbered exhibit.

(Plaintiff's Deposition Exhibit 16 was Marked For Identification)

A. If I take responsibility for it all, you don't really have to worry about getting—

Q. (Interposing) Well, I know, but I have to do this in English to simply build a record.

Now, here's Dwaine Tinsley again in the February 1982 issue. It shows a patriarchal figure sitting in a chair labeled "God," and it says, "Send someone down to see Falwell. Tell him to get off his power trip."

A. Hey, David.

(Plaintiff's Deposition Exhibit 17 was Marked For Identification)

Q. Mr. Flynt, do you take responsibility for that cartoon?

A. Sure, yeah.

Q. And it was intended, of course, again, to hold Reverend Falwell up to hatred, obloquy, scorn, contempt or truculence, as I think you added?

A. No. There's the affidavit you wanted, and it didn't quite make it. It's to Judge Tagasugi, and somebody fucked with it before it got there.

Q. All right, I'm going to pause and open up—

A. (Interposing) You keep that. Stick that in your pocket, Mr. Grutman.

Q. I'm going to open it on the T.V. You've handed me an envelope which says it has an affidavit in it—

A. Well, it's been opened now, and taped back up, and I didn't do that. I don't know what they took out of it. Let's see what's in there.

MR. ISAACMAN: You're opening it over objection of counsel.

MR. GRUTMAN: Yes, I'm opening it over objection. It was handed to me by Mr. Flynt.

Q. (By Mr. Grutman) It reads—it's from you.

A. Unh-hunh. (Yes) Would you read it for the record?

Q. It's dated March 19, 1984. All right?

I'm going to read it into the record. We have a little time.

A. Good.

Q. "Dear Robert." It's addressed to Robert Tagasugi, which I take it is a Federal Judge in California.

A. Yeah.

Q. And this is from you?

A. I'm on a first-name basis with him now.

Q. Okay, it reads:

"I have given up on these motherfuckers. I'm writing to you as a final, rather—as a friend—rather than as a judge, because I have nothing better to do.

"Judge Larkins said I could have my food supplement—ah—can't read it—said I could be examined by my own doctors. But so far, Warden Samples has refused to obey any judge other than judge—other than the sentencing judge.

"Dr. Kirby Samples say that your lack jurisdiction (sic) because you are not the sentencing judge.

"I say this because I told them that you and Judge Marshall had ordered my nurse therapist and—something or other—in at Terminal Island."

A. Kinesiologist.

Q. Anesthesiologist?

A. Kinesiologist. There's a difference. Neorkinesiologist.

Q. "They say the order must be reaffirmed each visit. So help me, when I get these handcuffs off and out of these restraints, I will choke the little cock-sucker until he turns blue in the face. Being dumb is just no excuse for violating someone's civil rights.

"I think I will ask Reagan for diplomatic immunity, and then I'm going to go to Grenada or El Salvador.

"The Secret Service was in again, asking if I was serious. How dumb can they get? I can't even get indicted for pimping."

A. Perjury.

Q. Oh, for perjury? All right.

"Gay Talese"—you may yet, Mr. Flynt.

A. I'm trying.

Q. "Gay Talese"—you bet. Take that to the bank.

"Gay Talese, the author who wrote 'Honor thy Father,' has fucked the same blonde that John F. Kennedy and I screwed around the USS Enterprise. You should ask Gay how old she was at the time. She said she was 19, but I swear she didn't look over 15.

"Jack Alnap called her the blue nun, but it was really—"

A. Jack who?

Q. Alnap?

A. Jack who?

Q. It says Alnap.

A. Let me see that.

Q. "But it was really brandy, white wine, or red wine. He didn't give a shit who knew, and neither did I."

A. Oh, that's Jack Kennedy. Put it in there right. Okay?

Q. Oh, this is "Jack always." Sorry, I misread that.

"The black widow was the code, 'Bravo Whiskey,' which meant we were fucking and no one should come in the Admiral's cabin. T for Tango meant Tallyho. That was also the name of a bar in Norfolk where I used to meet Kathy the Blue Nun.

"But I'm not going to give you her last name because I don't trust your brother.

"My one doctor George Ward has moved to Hannans, according to—"

A. Has moved to Hawaii.

Q. Hawaii. "—according to Marshall Laslow. He doesn't want to—"

A. Dr. Marshall Laslow.

Q. "—doesn't want to waste time with the study ordered by Ms. Dwyer. So if you don't want—"

A. Judge Dwyer. Magistrate Dwyer.

Q. "—you don't want to order her here, I guess that there is another dead doctor. They all think that they are God. But you and I both know that George Wallace—something—himself—claimed himself God before I came along."

A. No, George Wallace declared himself—

Q. "—God long before I came along. You see the flag nor the purple heart never bothered them, because they know I earned them both. It is where I stuck the flag that is driving them crazy. They can't figure out whether I stuck it in the Koran or in the King James.

"Mrs. Lillian once told me when I visited Plains, Georgia, that Marcos in the Philippines performed the Koran over the 'Hand'—"

A. Preferred.

Q. "—preferred the Koran over the 'hand,' you know what I mean?"

A. The hand, h-a-n-d.

Q. Yeah, what is that?

A. The Samurai.

Q. Oh, I see.

"Well, I tell you, I prefer the real thing, and I don't mean the judge. Real, I mean, the real wine. They have a bottle on the menu that cost ten thousand a bottle. Why don't you come down and visit with Charlie and I 'ops' remember Charlie and the Viet Kong (sic) were the same—"

A. ASAP.

Q. "—'Victor Kilo.' They will both kill you unless you know them both.

"We will make Ronnie and Nancy knock their—hock their jewelry and ranch. Can you believe the Kennedys and Carters both let those two sons of bitches live, after they paid for everything with Bobby's blood?

"You can bet your ass the death penalty will stay if I have anything to say about it. It should be in "the federal system, too.

"I hope Bush tries to pander just one of these assholes. Essentially—"

A. Pardon.

Q. Pardon.

"Especially Casey. I want that motherfucker all to myself, you know. I think the victim's family should decide how they should die or be punished. I favor torture over the death penalty.

"Don't forget if you come bringing some Jazula and Saki. Tell the Gruk to bring the ozo."

A. Ozo Saki.

Q. "Well, Bob, it's the late show you are on again, so I am signing off. Your friend, Larry."

Well, I have read all of that. I'll put it in an envelope and ask that it be marked as an exhibit.

A. Ask that it goes to Judge Tagasugi.

Q. Yeah, and I will ask you, Mr. Flynt, whether you remember that before you asked me to read that, you told me that was the affidavit to prove the truth of Reverend Falwell's fornication and incest, et cetera.

A. Well, it was in the envelope and they opened it up and took it out. Sivley knows exactly where it is. It's with the glasses.

And I think you ought to ask him to go get it because it's signed.

(Plaintiff's Deposition Exhibit 18 was Marked For Identification)

Q. I show you the March 1983 issue of *Hustler*—

A. (Interposing) I can't keep them from tampering with my mail. Can you?

• • •

[4/60]

Q. I thought you told me that everything that appeared in *Hustler* when you were in charge had to get your approval?

A. That cartoon was commissioned by the publisher at the same time I put Jesus H. Christ on the masthead of that December issue.

He came in like Mr. Spock. He would beam up through the window.

* * *

[4/69-70]

Q. You suggest Reverend Falwell messed with your leg?

A. I'm saying Reverend Farwell messed with my cock, and that's enough. He kept me in pain for six years.

Q. In what respect did Reverend Falwell mess with your penis?

A. 'Cause Reverend Farwell ordered—

Q. Ordered what? ?

A. —my assassination in Georgia.

Q. You know, Mr. Flynt, you expect us to take you seriously about this. There are about a half a dozen people that you have accused of being responsible for your being physically injured in 1978.

A. There were several people involved. I'll be glad to give you all their names.

Q. Yes. Have you ever before today suggested that Reverend Falwell was in any way involved in a conspiracy to effect your having been shot?

A. Yes.

Q. Where did you do that?

A. I told Mr. David Kahn this. And I tried to tell Mr. Isaacman, but he would not listen to it. He made me tell a psychiatrist instead.

But Mr. Kahn has always known, and in addition to that, there's one set of psychiatric records that I want to give you permission to get. It's from Dartmouth Hospital in Dayton, Ohio, and from Dayton State Hospital in Dayton.

* * *

[4/71]

Q. Have you attempted to divest yourself of your assets so as to render yourself execution-proof in the event that Reverend Falwell obtains a judgment against you?

A. No. I want Reverend Farwell to obtain a judgment against him, because what I'd like to do—see, I'm putting out two editions of *Hustler* now—soft-core and hard-core.

The soft-core edition is going to be for the Jesus freaks, you know. And the hard-core edition's going to be for me and all the rest of the perverts.

Q. You consider yourself a pervert?

A. No. I don't, but everybody else does. So I'm going to go along with them.

* * *

[4/72]

Q. That's right, Mr. Flynt. You blew up the Senate building.

A. Is that—

* * *

[4/72-73]

A. No, sir. I want to tell you who blew up the building.

Q. Okay.

A. Bill Ryder and Gordon Novel blew it up. And John DeLorean—

Q. They were working for you at the time.

A. John DeLorean had nothing to do with it. No.

Q. But they were working for you at the time, weren't they?

A. No. Jean Caufield and Sam—and Sam was working—what's Sam's last name—Sam—

MR. KAHN: Bast.

A. No, you're talking about Big Bast. I'm talking about Sam Walker—General Walker from Atlanta, 'cause he's the one told me about General Brown and Farwell's connection to the CDC—Center for Disease Control.

We had the meeting, and, see, I was meeting with Stokely Carmichael and Russell Means, and Dr. Madalyn Murray O'Hair. Okay.

And I was up till four o'clock in the morning trying to make sure that nothing happened. Okay?

And that's the night that I traded the Meese tape for the Laxalt tape—Senator Paul Laxalt, Republican, Nevada, and it's real.

Q. Mr. Flynt—

A. And Mr. Frank Sinatra has a copy.

* * *

[4/75]

Q. Okay. Before I conclude my examination of you, and turn you over to your own counsel for cross-examination, I would like to ask you one last time, do you presently have any tape recording, any video tape, any photograph, any affidavit, or any other writing which is in this facility or in this room which indicates that there is any truth to what was published in the Campari ad about Reverend Falwell?

A. Yes. Yes.

Q. And I will ask you a very simple question, in two words, produce it.

A. I am on disciplinary segregation. I have been placed there by the IDC unit and the UDC team. I have asked that Judge John B. Larkins lift the sanctions imposed by the Bureau of Prisons so they will return my property to me.

But everything I am asking you for, I have given copies to Lieutenant Stanley George Zahalion and Alan Graham. And Madalyn Murray O'Hair and Dick Gregory have some of them.

Now the information that you want on Mr. Farwell, I'll tell you what, it is real. Okay? And you know who I want to get it from? I want to get it from Dr. Alan Freedman at Duke University, because he does not work for the BOP, and he's got a copy of it.

* * *

[4/77-78]

Q. Whether they were in Los Angeles, or anywhere else, you did have certified financial statements for your company?

A. No. I gave power of attorney for that purpose to Dr. Victor Coleman, Clement Falls, Oregon.

I went up to meet with him at the same time I met with the FBI. And I met with Ken Graybill, the deputy director of the criminal division of the FBI. Him and Don Foster.

And Don Foster and him and Addison Lighthall asked me to help them go get Vesco and bring him back. And I told him, you know, that we'd get him in due time.

And they presented to me at that time a tape of Bill Casey and William French Smith laughing and talking about how they overthrew the government of Helmut Schmidt and Helmut Cole in Germany and blamed it on some Communist Iranian reactionary group.

And I have all of this stuff in a safe place. And I got plenty of copies if you want it. You got to understand, boy, the FBI is working for me. Not you.

Q. Thank you very much, Mr. Flynt.

* * *

DEPOSITION TESTIMONY OF BRUCE HELFORD

Read into Evidence December 7, 1984

[5/48]

(Excerpts of the Deposition of Mr. Bruce Helford, taken on September 28, 1984, were read into evidence by Mr. Isaacman and Mr. David Stoner as follows:)

* * *

[5/50]

Q. Can you tell me how that ad in ad and personality parody first came to your attention?

A. Give you its beginnings?

Q. That's what I'd like.

A. All the way through, okay. During an editorial meeting, Larry Flynt asked the art director to find some new blood to do ad parodies for the magazine; people outside the company.

* * *

[5/51-58]

Q. What was said at the meeting?

A. In regards to this, that he wanted some outside ideas. He felt that we had all been too close to the magazine. He wanted some outside input, and he asked that the art director contact various other art directors and other creative people for some ideas for parodies. In particular, he wanted to do some ad parodies.

Q. Did he mention any subjects at that time that he wanted to do ad parodies on?

A. No subjects were mentioned at that time, that I recall.

Q. Did he mention that he wanted to do an ad parody on Campari liquor?

A. Not that I can recall, not specifically.

Q. Did he mention that he wanted to do an ad parody on Jerry Falwell?

A. Not that I can remember.

Q. What else was said, if anything, at that meeting about doing fresh material?

A. Nothing in regards to this. I believe it's just that he did mention contacting Michael Salisbury, who had had previous workings with the company. I believe he designed Chic Magazine, which is also a Flynt publication. He was one of the ones specifically mentioned to be contacted.

Q. Who is Michael Salisbury?

A. He is an art director from, I believe, San Francisco. Somewhere in California,—that, as I said, he had previous experience with Larry Flynt Publications.

Q. You used a title, art director, a couple of times. What does an art director do?

A. Various things. In case of Michael Salisbury, he has his own communications company. He can do anything from redesigning a book to giving you concepts for ad parodies; anything that involves creativity with the media.

Q. What happened following that meeting?

A. In regards to this, the next thing was that—my next contact was from Bill Nirenberg, the art director, who said that Larry had seen a group of concepts from Michael Salisbury. He had shown him some that he wanted done and he gave me the list of those he wanted done. I was assigned to write the copy to fill those concepts.

Q. I'm going to show you a document which I'll ask the Reporter to mark as Exhibit A.

It's a document which has a date at the top. 14 July 1983. At the very top are the numbers, letter H, numbers 1505. Below that, the name Hustler. It's a two-page document. It has listings from 1 through 18.

Have you ever seen that document before?

A. Yes, I have.

Q. When was the first time that you saw it?

A. I don't remember the exact date of when it was given to me, but it was given to me through the art director, Bill Nirenberg.

Q. Where were you when you received it?

A. I'm not sure that I remember. Possibly in his office.

Q. But at the offices of—

A. At the offices of the magazine, certainly, yes.

Q. Where did the document come from, to your knowledge?

A. To my knowledge, it came originally from Michael Salisbury and I would assume through Bill Nirenberg to Larry Flynt and back to Bill Nirenberg.

Q. At the time you received the document, did you have any discussion about it?

A. Nothing in particular. Just that he pointed out to me which ads that Larry had wanted done and that was about the extent of it.

Q. There are listings on the document, listings from 1 through 18. What is your understanding as to the purpose of the matters listed on this document, Exhibit A?

A. These are possible ad parody concepts to poke fun at the ads enumerated.

Q. When you say ad parody, what do you mean by an ad parody?

A. An advertisement—let's see how best to explain this. It's an ad that makes fun of an ad that actually exists, so we're parodying something that people are familiar with.

Q. Number 6 is circled. Number 6 indicates Campari quote Jerry Falwell talks about his first time. Something like quote I never really expected to make it with mom, but then after she showed all the other guys in town such a good time, I figured quote what the hell, closed quote.

Where did this language come from that's listed in Number 6?

A. That would have to have been typed by Michael Salisbury, I would assume, because it came from his office, on his letterhead.

Q. Are those ideas that are listed here original with Michael Salisbury?

A. Well, I assume that they're all original. I have no reason to think that they wouldn't have been original from him.

Q. Do you have any reason to think that any of these ideas originated with people working in the employ of Hustler Magazine as opposed to Michael Salisbury?

A. I'd have no reason to think that, no.

Q. At the time, Michael Salisbury was not in the employ of Hustler Magazine. Is that correct?

A. No, he was not. Correct.

Q. After you received Exhibit A, what did you do?

A. When time permit, I would go ahead and work on the ad parody, presenting it before my deadlines to get it properly into the magazine.

Q. Now, what did your work consist of?

A. Taking of a true Campari ad and trying to make a humorous parody based on the stylistic format of that ad with and including the concept and basis given by Michael Salisbury.

Q. I show you a document which I'd ask the reporter to mark as Exhibit B. It's a one page document at the top which indicates Geraldine Chaplin talks about her first time. At the bottom, indicates Campari the first time is never the best.

Now, have you seen this document before?

A. I believe so, yes, or I've certainly seen ads like this one, yes.

Q. Do you recall what Campari ads you looked at in doing your preparing of the ad parody that's the subject matter in this lawsuit?

A. I don't remember exactly, because they had a full line of them using different copies for each time, so I can't say exactly which one I used to base the parody on.

Q. Do you recall whether it was a parody of the type that's in front of you as Exhibit B?

A. It was certainly a parody of that type, yes.

Q. Do you recall when it was that you worked on the ad parody that appears in the November issue of Hustler Magazine?

A. I can give you an approximate time only in that I know that the concepts were apparently submitted on the 14th of July and that the actual copy was approved on either August 4th or August 5th, so that would have been sometime between that.

Q. In the course of your working on the ad parody, did you have discussions with anybody else about the content of the ad parody?

A. No, I did not.

Q. At some point after you had worked on the ad parody, did you have any meetings with anybody concerning the subject of the ad parody?

A. The normal course of material would have been for me to present the final written copy to either the editorial director or whoever the editor in charge would have been under Larry, and I believe it was Kelley Garrett at

that time. But it was very often the case to expedite matters; I would take things in directly to Larry, and I believe in this matter, along with editive material for other sections, I took this in directly to Larry.

Q. Apart from what Mr. Salisbury submitted, was the content of the ad parody created by you?

A. The other copy, except for in particular where that line, I never—the one that you quoted, I never— beginning, I never really expected to make it with mom, which set up the basis for the ad, right.

Q. That was submitted by Salisbury and you didn't write that? He did?

A. Right.

Q. But the rest of it, you wrote. Is that right.

A. Yes, that is correct.

Q. Did you have any discussions with other people at Hustler Magazine prior to the publication of the ad parody about the subject of the ad parody?

And I recognize it's possible that at one or more of those discussions—if you had one or more discussions—there may have been counsel such as David Kahn present; if so, I am still asking you to testify about what was said at that meeting or meetings, and on behalf of the company, we are not asserting any attorney/client privilege in terms of what was said at that meeting of [sic] meetings.

A. Okay. The normal route after Larry had approved the copy—I presented this to Larry Flynt. He looked at it. He signed it. Through his approval at that point, it goes back into the system where the production editor or

managing editor sends out copies of the material to various departments who have to double check for grammatical errors, research checking for fact problems, legal department, so it would go to all these different places. At a later editorial meeting, and I don't remember whether it was the same day or whether it was days later, but after this point, there was, at the end of the editorial meeting, a discussion instituted by David Kahn about the possibility of putting some sort of notation on the bottom of the ad: that it was an ad parody. And this included various editors of the magazine, Larry Flynt himself, and I was present.

* * *

[5/59]

Q. Now, to the best of your recollection, what was said by each of the people there with respect to the subject matter of this ad parody?

A. Well, the discussion was whether or not there was any chance of anyone taking this seriously or not. As I remember, Larry and some of the other editors felt that it was absolutely ridiculous that anyone could read this and believe that it was in any way true about Jerry Falwell or that he would even agree to do a Campari ad.

My intent—my intent, along with David Kahn, was that there may be someone somewhere out there who might be—you know, I mean, you have idiot lights on cars to let you know when your oil goes out, but it's already too late. There might be somebody out there who might not understand, and for that purpose, perhaps putting the words "ad parody" might be a good idea.

* * *

[5/62-64]

Q. At the time the ad parody was prepared, did you have any personal animosity towards Jerry Falwell?

A. No, absolutely not.

Q. Did you have any belief, at the time that the ad parody was prepared, as to whether anybody would believe that it was a genuine interview with Jerry Falwell?

A. No. It was written to be as ridiculous as possible; to be the opposite of anything believable.

Q. So your thinking was that no one could possibly believe it was true. Is that right, that he was giving this interview? [sic.]

A. Yes. That's what I believe to be true. I think it's fairly publicly known that Mr. Falwell doesn't believe in drinking or sexual excess or anything like that, so it would have to be against the public image of how people perceived him and he wishes to be perceived.

Q. * * * Tell us all the reasons you can think of as to why, at the time you prepared this ad parody, you didn't think that anybody could take it seriously.

A. Well, it was just ridiculous to believe that he would do these things. I mean, just knowing about him and then knowing what was written in the ad.

It was all made to be as ridiculous as possible and—I mean, that he would drink or any of those things—just written to be ridiculous. That's the humor in the parody. It's like taking a dull person and saying, "There's a fun guy," and so he's not a fun guy. You're saying that as a point of humor. You're parodying that.

Q. Did you think it was ridiculous to believe that he would give an interview to Hustler Magazine?

A. Yes.

Q. Did Larry Flynt ever say in your presence that he believed that someone reading that ad parody would believe that the statements contained in there are true?

A. No, he never said that.

Q. Do you know what is meant by the term "national advertising?"

A. I believe so.

Q. What do you understand that to mean?

A. Advertising of a product or a service that is nationally known and recognized and promoted in national media.

Q. That Campari ad that was done on behalf of Campari—and I'm distinguishing now between the real Campari ad and parodies—is that a national advertisement?

A. Yes, I would say that's a nationally advertised campaign.

Q. At the time this publication came out, November 1983, the one that's the subject of this lawsuit, did Hustler run national ads?

A. No, Hustler had no advertising of any nationally known products and doubtfully any products that aren't of a sexual nature that are even advertised in Hustler Magazine.

Q. Was that another factor influencing your thinking as to whether any Hustler readers would think that this was an authentic ad?

A. Certainly Hustler readers know that there is no national advertising in Hustler—at least has not been for many, many years and probably not—of any products that aren't of a sexual nature, very few, and certainly not tobacco or liquor ads, as the magazine has often railed out against them, those problems, products.

* * *

[5/65-66]

Q. Apart from the ad parody that's contained in Exhibit C, did Hustler Magazine publish other ad parodies?

* * *

Q. Well, let's say ever. Did it publish ad parodies ever?

A. Yes, yes.

Q. I show you a document which I'd like to have marked as Exhibit D at the top of which appears the name Toyota, at the bottom of which appears: "From those nice people who brought you Pearl Harbor."

Do you recognize Exhibit D?

A. Yes, I do.

Q. Can you tell us what that is?

A. That was an ad parody that appeared in Hustler Magazine, apparently on the back cover of that same issue.

Q. Of the November 1983 issue?

A. Yes.

Q. I'd like to have this document marked next in order, Exhibit E. It's a document at the top of which indicates: She had plenty of life insurance. At the bottom of which indicates Metropolitan Street Life.

I show you Exhibit E. Do you recognize Exhibit E?

A. Yes, I do.

Q. Can you tell us what it is?

A. It's another ad parody that was in that same issue in the inside back cover.

Q. Was it common practice for Hustler Magazine to run ad parodies in November 1983?

A. In November 1983, yes.

* * *

COURT'S INSTRUCTION TO THE JURY REGARDING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

[6/136-137]

Now, I'll ask you to go to question number three (3).

3A says: "Do you find by a preponderance of the evidence that the defendant, Larry C. Flynt, conducted himself in such a manner in connection with the article in question as to intentionally inflict emotional distress upon the plaintiff?"

3B asks the same question as to Hustler Magazine. 3C asks the same question as to Flynt Distributing Company.

The court tells you that in answering this question, in order to answer all or any part of it "yes" four (4) elements must be shown by a preponderance of the evidence. One: That the wrong-doers' conduct was intentional or reckless. This element is satisfied where the wrong-doer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two: That the conduct was outragious [sic] and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigations in situations where only bad manners and mere hurt feelings are involved. Three: There was a casual [sic] connection between the wrong-doer's conduct and the emotional distress. And four: That the emotional distress was severe.

DEFENDANTS' REQUESTED INSTRUCTIONS REGARDING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

INSTRUCTION NO. 18

In order for you to find in favor of plaintiff on his claim for intentional infliction of emotional distress, you must find that the plaintiff has proven, by a preponderance of the evidence, each of the following facts:

(1) That defendants' conduct towards plaintiff was extreme and outragious [sic]; and

(2) That defendants engaged in such conduct with the intention of causing plaintiff to suffer severe emotional distress or in reckless disregard of the likelihood that plaintiff would suffer severe emotional distress; and

(3) That plaintiff suffered severe emotional distress as a direct and proximate result of defendants' conduct.

In addition, in order to conclude that the defendants' intentionally inflicted emotional distress upon plaintiff by publishing the Campari item, you must find by clear and convincing evidence that the defendants acted with actual malice, as I have already defined it.

Restatement 2d of Torts, § 46; *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Reader's Digest Ass'n v. Superior Court*, — Cal. —, Slip Op., Nov. 19, 1984.

INSTRUCTION NO. 19

In order for conduct to constitute "extreme and outrageous conduct", as that term is used in the law, such conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. It must be such conduct as would distress a reasonable man of ordinary sensibilities.

Mere insults or accusations do not constitute "extreme and outrageous conduct".

Prosser, *The Law of Torts* (4th Ed., 1971), pp. 54, 59; Restatement 2d of Torts, § 46; *Orlando v. Alamo*, 646 F.2d 1288 (5th Cir. 1981); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974)

INSTRUCTION NO. 20

In order for plaintiff to recover on his claim for intentional infliction of emotional distress, he must show that he suffered severe emotional distress. The distress suffered must be such that no reasonable man could be expected to endure it. The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the defendants had knowledge. Mere hurt feelings do not constitute "severe emotional distress".

Restatement 2d, Torts, § 46, comm. 1; *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87 (3d Cir. 1980)

DECLARATIONS IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE DEPOSITION TESTIMONY OF LARRY FLYNT

DECLARATION OF THOMAS C. GOLDMAN, M.D.

I, Thomas C. Goldman, M.D., the undersigned, declare:

1. I am a licensed psychiatrist with a practice in psychiatry and psychoanalysis primarily in Washington, D.C. I know the following facts of my own personal knowledge and, if called and sworn as a witness, could and would competently testify thereto.

2. I graduated from Harvard Medical School in 1966 and thereupon completed my internship at the University of Chicago Hospital and Clinics. From 1967-1970 I was a resident in psychiatry at the Bronx Municipal Hospital Center in New York City. I was a clinical associate at the National Institute of Mental Health in Bethesda, Maryland from 1970 to 1972. I have been in private practice in psychiatry since 1972. I was on the faculty of Howard University from 1972 to 1975 and was on the faculty of psychiatry at Georgetown University Medical School from 1975 to 1976. I was a consultant for the Division of Forensic Programs at St. Elizabeth Hospital, Washington, D.C. from 1973 to 1977. I belong to numerous honorary and professional societies including the Medical Honor Society, AOA, the American Psychiatric Association, the D.C. Medical Society, the American Psychoanalytic Association, and the American Academy of Psychiatry and the Law. I have qualified to testify as an expert in the field of psychiatry on several hundred occasions including two to three dozen times in the United States District Court.

3. On June 16, 1984, the day after Larry Flynt's deposition was taken in this matter, I met with Mr. Flynt at

the Federal Correctional Institution at Butner, North Carolina and performed a psychiatric evaluation of him.

4. On June 16, 1984 I observed Mr. Flynt's behavior for approximately six hours. During that time he exhibited symptoms characteristic of a manic or hypomanic state including but not limited to, grandiosity, pressured speech, hyperactivity and seriously impaired judgment and impulsivity. I found it difficult to elicit a clear history from Mr. Flynt because he frequently went off on tangents. He was obviously responding to what concerned him, often referring to his purported contacts in high places and his "knowledge" of the serious wrong-doings of numerous public figures. He also displayed a number of "clang" associations; that is, he would in the midst of a narrative suddenly connect words based on similarity of sound rather than logical continuity or meaning. Mr. Flynt was unable to say more than one or two connected sentences on a subject without diverting himself to the task of yarnspinning.

5. During my discussions with Mr. Flynt he acted as though it made no difference whether what he told me was literally true or not.

6. Based on my face-to-face meeting with Mr. Flynt on June 16, 1984, together with reviewing certain other materials respecting his conduct, including the transcript and videotape of his deposition on June 15, 1984, I have formed opinions as to his mental condition as of June 15-16, 1984. At that time Mr. Flynt suffered from a pathological state of mind, that is, a manic or hypomanic state. He was irrational and had seriously impaired judgment and self-control. Because of his "manic-grandiosity" he was motivated to act as though he believed himself immune from and invulnerable to any believed threat, and in particular

to the judicial system and deposition process. This motivational set, in my opinion rendered Mr. Flynt relatively unable to judge what was in his best self interest or to respond or act in any manner other than as he did; that is, with utter disregard for the truth of his statements despite the fact (indeed, perhaps because of the fact) that he was presumably under an oath to tell the truth. In so doing, he was flying in the face of what, in a less grandiose mood, he could have recognized as his own reasonable best interests.

7. In my opinion, the disorders and motivations described above prompted Mr. Flynt to utter his responses without regard to their truth.

8. In my opinion, the injuries sustained in the 1978 shot-gun shooting may be a factor in explaining Mr. Flynt's behavior. The shot-gun blast rendered him a paraplegic and subjected him to intolerable pain. His years on anti-pain medication delayed the necessary process of coming to terms with his severely damaged body with anything like a clean frame of mind, until relatively recently when a neuro-surgical procedure substantially alleviated his pain. In my opinion, his tendency to manic-grandiosity represents his psychic inability to accept his altered physical state.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this — day of November at Washington, D.C.

THOMAS C. GOLDMAN, M.D.

DECLARATION OF DR. SAUL NIEDORF

I, Dr. Saul Niedorf, the undersigned declare:

1. I am a licensed physician and practice the specialty of psychiatry primarily in Los Angeles, California. I know all of the following facts of my own personal knowledge and, if called and sworn as a witness could and would competently testify thereto.

2. I am licensed to practice medicine in California, Missouri, Iowa and Maine. I am a member of the American Psychiatric Association, American Orthopsychiatric Association, Southern California Society for Child and Adolescent Psychiatry, American Medical Association, and Southern California Psychiatric Society. I am a diplomate of the American Board of Psychiatry and Neurology, Psychiatry and Child Psychiatry certified 1969. I am and have been an instructor or professor at numerous medical schools including but not limited to the Washington University School of Medicine, University of California at Los Angeles School of Medicine and University of Southern California. In the course of my practice, I have been and am affiliated with numerous hospitals including, for example, Cedars-Sinai Medical Center and the UCLA Medical Center in Los Angeles, California. I have been qualified as an expert in legal actions on several hundred occasions and have been serving from 1979 to the present as a consultant specialist to Administrative law judges in the office of hearings and appeals, Social Security Administration in Los Angeles and Santa Barbara. Further I am a consultant to the State of California Youth Authority and also of Department of Mental Health, County of Los Angeles and Assistant Clinical Professor of Psychiatry at the UCLA Medical School.

3. I have been seeing Mr. Larry Flynt regularly in psychiatric treatment since November 1983 except for the months he was in Federal prison in 1984. In the course of that time, I have treated Mr. Flynt on approximately 20 occasions and am very familiar with his condition. My last session with Mr. Flynt occurred on November 4, 1984.

4. I have reviewed the deposition transcript of Mr. Flynt dated June 15, 1984. The behavioral symptoms exhibited there are similar to and consistent with those I observed when I treated Mr. Flynt in November and December 1983. In particular, he was manic, grandiose and delusional and responded to inquiries and authorities without regard to the truth of his statements. This disregard for the truth was motivated by his mental condition. In June 1984, Mr. Flynt suffered delusions (for example, that he had affidavits of witnesses who saw Plaintiff engage in sexual acts with Plaintiff's mother). Because of his great intelligence and style of delivery, however, he appears convincing but the content of his responses are patently delusional.

5. Moreover, Mr. Flynt's having to wear handcuffs at the deposition for as long as he did, adversely affected his mental state and contributed to his severe manic conduct. In addition, his having to lie on his bedsore throughout the deposition further contributed to his irritability and aggressiveness that further stimulated his psychotic responses. His contemptuous conduct was an unconscious mechanism resulting from his mania and contributed further to the lack of accuracy of his testimony.

6. During the June deposition Mr. Flynt demonstrated an elevated expansive and irritable mood with excessive flights of ideas especially when confronted or

thwarted. He had confabulation and irrelevant responses. He spoke with an inflated self-esteem and involved himself in statements typical of manic patients and dealt with political, religious, entertainment, police and sexual issues in a delusional and psychotic manner, involving ever increasing complexities and juxtapositions in an ever-spiralling manner.

7. A characteristic of mania is the patient involving himself with statements having a high potential for painful consequences which the patient does not recognize. Hence the extraordinary lack of good judgment and the colorful appearance and speech that these patients present and which Mr. Flynt exemplified at his deposition. Mr. Flynt thoroughly exemplified these manic characteristics throughout his entire deposition.

8. Mr. Flynt's mania and physical condition on June 1984 gravely impaired him and his abilities to remember and recount events, so much so that he was not competent as a witness.

9. Mr. Flynt's mental illness in June 1984 precluded his giving a competent truthful statement at his deposition just as his spinal cord being severed precluded his standing up or walking. It is possible that his paraplegia led to the over-compensation of his manic disorder.

I declare under penalty of perjury under the laws of the the United States of America that the foregoing is true and correct.

Executed at Los Angeles, California this 6th day of November, 1984.

/s/ Saul Niedorf
DR. SAUL NIEDORF

EXHIBITS TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE DEPOSITION TESTIMONY OF LARRY FLYNT

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Magistrate's Criminal No. 83-0582
vs	)	
LARRY C. FLYNT,	)	(Filed July 13, 1984)
Defendant.	)	Courtroom No. 14
	)	United States Courthouse
	)	3rd and Constitution
	)	Avenue, NW
	)	Washington, D.C.
	)	Tuesday, June 26, 1984

The above-entitled matter came on for hearing before HONORABLE JEAN F. DWYER, United States Magistrate, commencing at 10:23 a.m.

* * *

BY MR. FLYNT:

Q. Doctor, could you tell me: does the kind of clothes that an individual wears, does that have anything to do with signifying personality disorder?

A. It can.

Q. Would you explain that?

THE COURT: I really do not see that this is relevant to the issue of competence, Mr. Flynt. You have done an excellent job so far. I am impressed by your ability to

maintain this examination. But do let's keep to the subject, shall we?

MR. FLYNT: I will try.

* * *

THE COURT: Good afternoon, ladies and gentlemen.

Counsel, I have during the last hour given this matter a very great deal of thought. I have reviewed the records which have been provided me, not only the psychiatric reports but of various hearings.

We start off with the proposition that anyone who appears before the Court is presumed to be sane and competent and that there must be clear and convincing evidence in my view to overcome that presumption.

With all respect to Dr. Goldman, my observation of Mr. Flynt himself, other psychiatric reports which have been provided me lead me to the conclusion that Mr. Flynt is in fact competent and able to assist counsel in his own defense or to conduct his own defense. The Court so rules.

EXHIBIT H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal Minutes—General

Case No. CR-83-979-CBM Date Jan. 30, 1984

DOCKET ENTRY: Competency Hrg: ct finds deft competent to stand trial. Ct. ents. n/g plea to counts 1 and 2 on behalf of deft. Bond is set at $10,000 corporate surety.

PRESENT: HON. CONSUELO B. MARSHALL, Judge

Joseph M. Lavario Deputy Clerk | Elizabeth Turner Court Reporter | Mark Bonner Asst. U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)	ATTORNEYS FOR DEFENDANTS
(1) Larry Flynt	(1) Alan Isaacman
x present — bond	x present — retained
x custody —O/R	x appointed

• • •

PROCEEDINGS: PLEA & TRIAL SETTING

• • •

Court orders matter set for jury trial on April 3, 1984 at 9:30 A.M. Court sets matter for hearing on motions and for status conference on March 9, 1984 at 1:30 P.M. All motions shall be filed not later than 2/27/84; any opposition to such motions shall be filed not later than 3/6/84; any reply to opposition shall be filed not later than 3/12/84.

EXCERPTS FROM PLAINTIFF'S TRIAL
EXHIBIT 1 NOVEMBER 1983
ISSUE OF *HUSTLER MAGAZINE*

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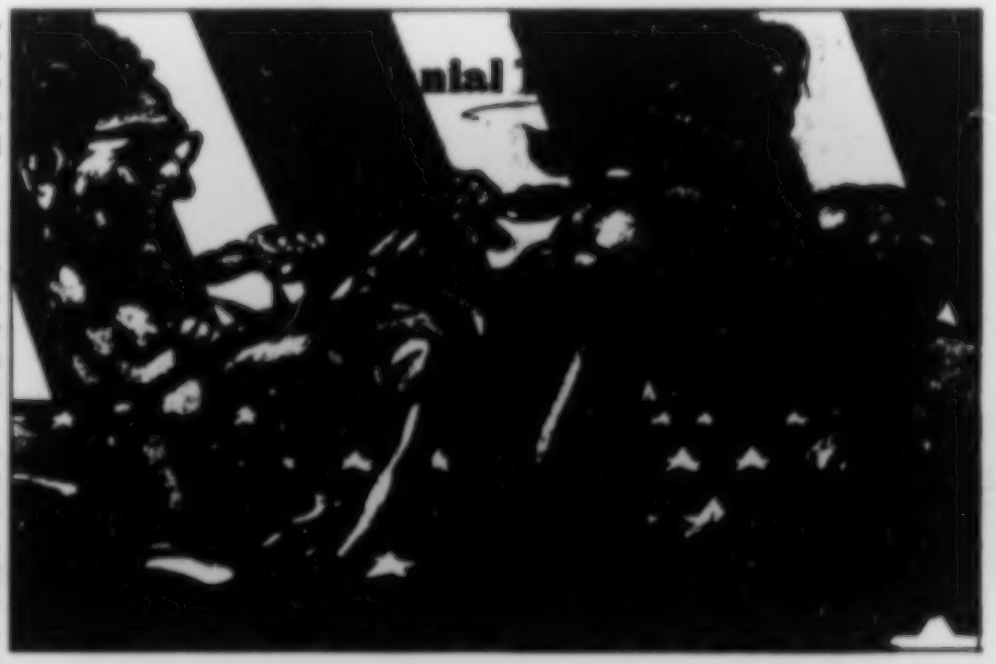
HUSTLER NOVEMBER 1983 VOLUME 10 NUMBER 5

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PUBLISHER'S STATEMENT



The Politics of Porn

Never in publishing history has any magazine been censored and prosecuted as much as HUSTLER. Many have asked why. The answer is simple: We are a political journal as well as a sex publication. And believe me, *politics* is what gets us in trouble, not pornography.

The famous illustration on this page prompted our indictment in Cleveland, Ohio, in 1976. During my well-publicized obscenity trial in Cincinnati in 1977 the prosecutor became obsessed with a cartoon in the magazine that showed Santa Claus holding his large cock that had been intentionally exaggerated. The caption had Santa saying, "This is what I have to ho-ho-ho about."

After the trial the prosecutor, Simon Leis Jr., was interviewed by the Thames Television network from Great Britain. He was asked why, of all the pornographic magazines for sale in Cincinnati, he had chosen to prosecute HUSTLER. The interviewer in effect asked, "Isn't what HUSTLER is doing just good, dirty fun?" The prosecutor replied that there was nothing funny about the magazine attacking every institution in the country, including Santa Claus.

After hearing that, I wonder what the Europeans thought about our Constitutional provisions for a free press. I was found guilty in that trial, sentenced to seven to 25 years in prison and denied bail while murderers, robbers and rapists were freed on bond. The case was eventually overturned on appeal, but I am facing retrial on October 24 of this year–seven years after the original indictment.

A year after the Cincinnati trial, on March 6, 1978, in the Atlanta suburb of Lawrenceville, Georgia, I was again tried for obscenity. The prosecutor was all bent out of shape–not by our outrageous Scratch 'n' Sniff Centerfold for that month–but by a quarter-page black-and-white cartoon of a nun taking a shit. The turds were in the shape of crucifixes. Between God, Country and Santa Claus I couldn't seem to win for losing. At that time it dawned on me that freedom of expression in America could no longer be taken for granted.

The court recessed for lunch that day. I went to a cafeteria a few blocks from the courthouse with my attorney. We talked about what kind of verdict to expect. My previous courtroom experiences convinced me that if anyone got justice, it was a fluke. But I refused to give up hope. If I was found not guilty after being found guilty in Cincinnati, I would be an embarrassing reminder of the 1973 Supreme Court decision allowing local communities to set their own standards for obscenity.

My hopes were short-lived. While walking back to the courthouse, I was shot three times in the stomach with a .44-Magnum rifle, permanently paralyzed and given less than a 1% chance to survive. The judge kindly declared a mistrial, and the prosecutor dropped the charges, figuring justice had been well served. A straw poll of the jury revealed that they were going to acquit me. That is only a partial view of our legal hassles.

HUSTLER's circulation has also been limited by wholesalers and retailers who censor us by restricting our distribution within their communities, usually for political reasons. For example, we lost sales when Jewish retailers were offended by our making Israeli Prime Minister Menachem Begin Asshole of the Month, even though we did it for reasons that had nothing to do with anti-Semitism. Conservative retailers have been outraged by our attacks on such people as Richard Nixon and William F. Buckley. And, of course, the Moral Majority has made us its *numero uno* target.

I have mentioned only a few examples of the things that have caused us so much trouble with circulation, let alone the millions of dollars I have spent in legal fees. Had I simply wanted to be a rich man, the decision would have been easy. I could have done as Hefner and Guccione did with *Playboy* and *Penthouse*; that is, masqueraded my pornography as art by wrapping it in articles purporting to have socially redeeming value. But by not compromising my principles and by remaining honest with my readers, I have proved that HUSTLER is the most preferred men's magazine. The only reason we're not outselling both *Playboy* and *Penthouse* together is the censorship efforts I spoke of. But the day shall come when HUSTLER will take its well-deserved position at the top, because nothing can prevent an idea whose time has come. And I will get there without copping out.

I am not defying the law. I am exercising my rights under the law, and the people who don't like it can kiss my dead, paralyzed ass. That includes everyone from the lowest prosecutor all the way up to President Reagan. The First Amendment and the Bill of Rights belong to me and the people who read HUSTLER as much as they belong to Reaganites and the Falwellians of the world and their Moral Majority. I'm not against democracy, but majority rule simply cannot exist without regard for individual rights. I seek no protection that isn't afforded me under the Constitution of the United States, the law of the land. With your continued support we shall prevail. If you have difficulty obtaining HUSTLER in your community because of censorship problems, I suggest that you subscribe.

Larry Flynt

Publisher

SHE HAD PLENTY OF LIFE INSURANCE. UNFORTUNATELY, HER PIMP DIED.



Today almost every hooker understands how important it is to have life insurance. The streets can get pretty rough. But what if her *pimp* is offed? Who's going to find new johns? Who's going to supply the smack? Clearly, his loss would create financial hardships for her and the two mulatto kids he left behind.

With Metropolitan Street Life's new Whore Plus plan, a prostitute can get permanent insurance protection that provides door-to-door Cadi!lac service, up to three fixes daily and a big black motherfucker with a gun—just as if your main man *was still around*. What do we ask in return for a safe future? 50% of the action. That's probably a better deal than *he* gave you. And *we* won't beat you upside the head.

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Professionals Helping Professionals

TOYOTA



From those nice people who brought you Pearl Harbor.

EXCERPTS FROM PLAINTIFF'S TRIAL EXHIBIT 3 MARCH 1983 ISSUE OF *HUSTLER MAGAZINE*

BEDROOM PHOTOS!

LARRY McDONALD NUDE!

HUSTLER

THE ARRO

3RD

PHOTO-SESSIO

THE ROCK 'N' ROLL WARS

HEMLOCK SOCIETY: FIGHTING FOR YOUR RIGHT TO DIE

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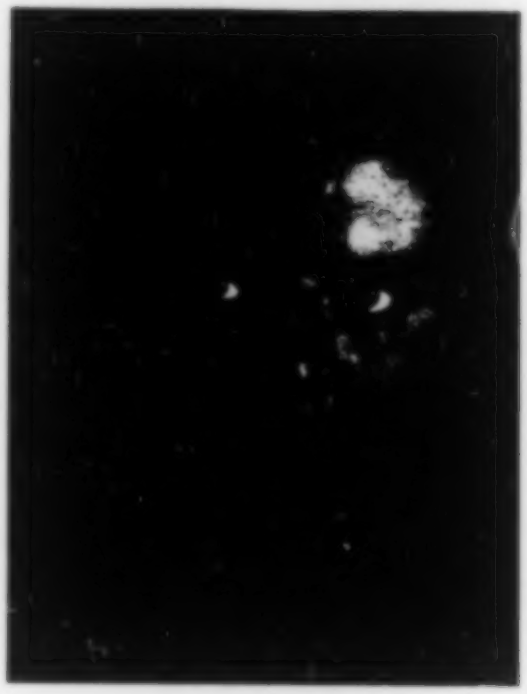
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THE DESECRATION OF AMERICA

Henry David Thoreau once said that in an unfree society the only place for an honorable man to be is in prison. Last December I was locked up in California and Illinois federal penitentiaries for a very simple reason: I still believe in the First Amendment and in a free press. I was put in jail because I refused to reveal my confidential sources as an editor and publisher. That alone is why courts from Los Angeles to Chicago to Washington, D.C., continue to persecute me.

They claimed that I was in contempt of court. Well, in a philosophical way they were right. I have always thought this nation's courts were deserving of contempt.

We cannot take them seriously until they take our First Amendment rights seriously. What else but contempt can we have for judges cloaked in black robes who cloak the crimes of white-collar gangsters? What besides contempt can we feel for judges who conspire with multimillion-dollar criminals and then jail the hungry and unemployed who have stolen a loaf of bread for their families? Can anything be more contemptible than courts that permit our environment to be destroyed by giant corporate polluters? Are judges who permit the FBI and the CIA to tap the phones of honest Americans, and spy on their every move, worthy of anything but contempt? And what better word can describe courts that for almost 200 years allowed citizens of a darker color to be forced to sit, work and study apart from others of lighter skin?

As I sat behind Ronald Reagan's prison bars, I reluctantly concluded that I could no longer run for the Presidency of this country. I could not see myself presiding over the organized filth and corruption that calls itself the U.S. government. This does not mean, however, that HUSTLER or I will let up in our campaign to expose and do away with the hypocrisy, lying and madness that have become commonplace in the halls of financial and political power.

Many of you may have read about my being charged with desecrating the American flag last November when I wore what appeared to be such a flag during an appearance in court. The meaning of the word *desecrate*, according to *Webster's New Collegiate Dictionary*, is "to treat irreverently or contemptuously often in a way that provokes outrage on the part of others."

Treating sacred cows irreverently and contemptuously–in order to make a point–is exactly what HUSTLER has always done throughout its 8½ years of publishing and will continue to do as long as the First Amendment is upheld. And outrage could well be my middle name. I'm outraged, for example, about how the American flag was desecrated when it marked airplanes that carpet-bombed Vietnam and Cambodia back into the Stone Age. I'm outraged about how the flag was desecrated when U.S. Marines were sent to invade and bully Grenada, a backward island the size of a golf course, just because the senile actor in the White House and his gung-ho cronies no longer approved of that nation's government. The greatest outrage is how our flag is desecrated as it stands next to Ronald Reagan when that warmonger appears on television spewing forth his usual coverups and deceptions.

Our flag should symbolize peace, not a suicidal nuclear-arms race. It should stand for honesty and integrity, rather than information gaps and Presidential lies. It should represent equal rights for all, instead of discrimination against the minorities and ethnic groups that compose much of America. Our flag should stand for defense of individual rights, not the blatant trampling of such rights by the courts, the Congress and the White House.

I was jailed because I still speak out against those who violate those rights. Throughout history, jailings, arrests and persecution have never been able to stifle the truth. I fully expect that those who seek to subvert the truth will imprison me again. If you ask me what I'm doing in jail when that happens, I'll answer the same way Thoreau did: "What are you doing *out* of jail?"

Larry Flynt

Editor

Jerry Falwell talks about his first time.*



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . .

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you?



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48° proof Spirit Aperitif (Liqueur)

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. ***Campari. The mixable that smarts.***

CAMPARI® **You'll never forget your first time.**

*AD PARODY—NOT TO BE TAKEN SERIOUSLY

PLAINTIFF'S TRIAL EXHIBIT 6
DRAFT OF AD PARODY

HUSTLER - November

Campari Ad

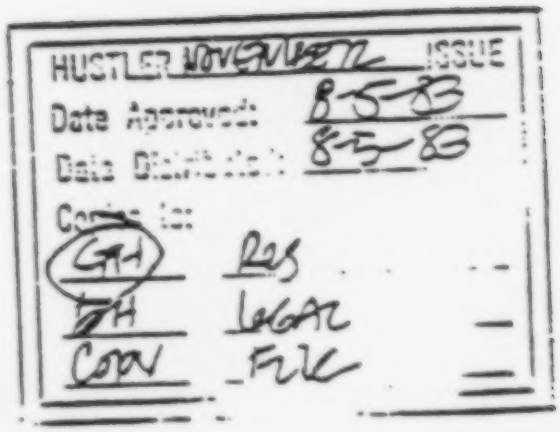
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OK FT.



JERRY FALWELL TALKS ABOUT HIS FIRST TIME *



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

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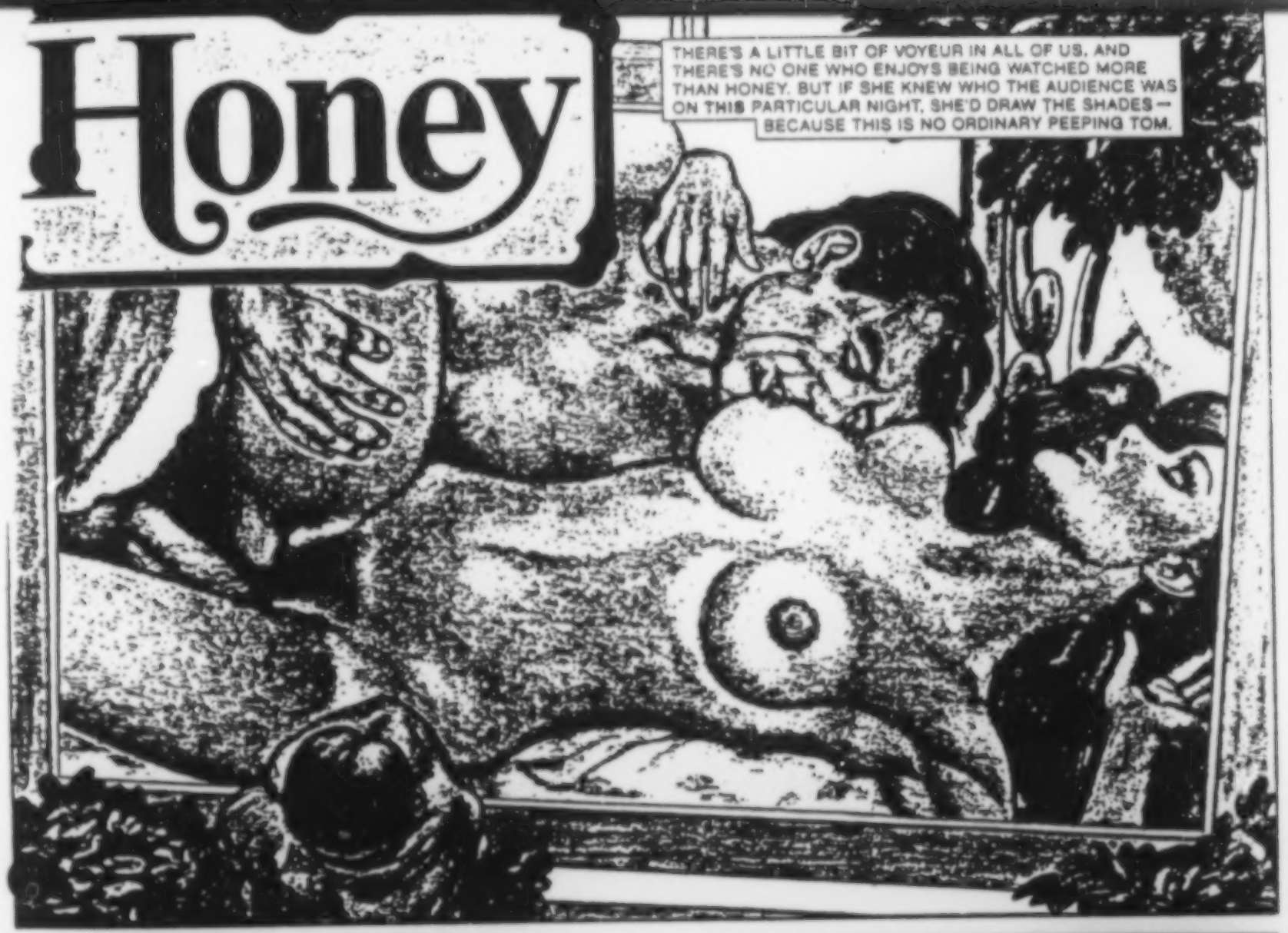
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INTERVIEWER: Campari in the crapper with Mom...how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

PLAINTIFF'S TRIAL EXHIBIT 7
EXCERPT FROM OCTOBER 1983
ISSUE OF *HUSTLER MAGAZINE*

Honey



Art: Tom Cern Text: Bruce Hellord

184.

YES, FRIENDS, GOVERNMENT CORRUPTION IS RAMPANT, DRUG SMUGGLING IS AT AN ALL-TIME HIGH, AND INTERNATIONAL TERRORISM IS JUST AROUND THE CORNER. BUT THE FBI HAS DECIDED TO STICK THE LONG ARM OF THE LAW INTO THE WORLD'S OLDEST PROFESSION.

FBI BRIEFING ROOM

HOOVER 1 CONT.

KEEP YOUR BRIEFS FROM PRYING EYES

Th-Th-Th-That's All, Folks!

CLICK!

WE CALL IT PROJECT HOOKERSCAM, MEN AND THE FIRST "STING" WILL BE AT HONEY'S BROTHEL. VOLUNTEERS JUST RAISE YOUR DICKS.

AFTER THE SELECTION OF THE "CREW," THE AGENTS ARE BRIEFED ON THEIR MISSION.

YOU'LL BE WORKING WITH TWO OF THE GOVERNMENT'S TOP OPERATIVES. THESE MEN WILL ARRIVE AT HONEY'S IN DISGUISE AND PROVIDE YOUR HIDDEN CAMERAS WITH ALL THE EVIDENCE NEEDED TO BREAK UP THIS DEN OF ANTIQUITY... ER... INEQUITY... ER... WHOREHOUSE!

A WEEK LATER THE "STING" BEGINS WITH THE ARRIVAL OF THE "CLEVERLY" DISGUISED OPERATIVES AT HONEY'S.

GOOD EVENING, MA'AM. WE'RE PAGANS... ER... ARABS LOOKING FOR SOME GOOD TIMES... IF YOU KNOW WHAT I MEAN. MY NAME IS ABDUL...

...AND I'M SCAMDUL. I ASSURE YOU, THIS IS NOT A COVERT OPERATION...

PUT SOME SAND IN IT, SCAMDUL.

ABDUL QUICKLY APPROACHES THE SUBJECT OF HONEY'S BUSINESS.

EXACTLY WHAT SERVICES DO YOU PROVIDE HERE?

WHAT DID YOU HAVE IN MIND?

ARABS WITH A CAMERA CREW? SOMETHING'S ROTTEN IN SAUDI ARABIA!

PROPERTY OF FBI

HOPING TO FIND OUT MORE ABOUT HER VISITORS, HONEY TAKES THEM ON A TOUR OF HER HOUSE.

IF YOU'RE INTO WATERSPORTS, BROWN SUGAR HERE CAN MAKE ALL YOUR WET DREAMS COME TRUE!

NANCY... I MEAN, MRS. SCAMDUL... SAYS I'M TOO MUCH OF A TIGHT-ASS FOR ENEMAS.

NEXT STOP, ILSA'S DUNGEON

FOR THOSE WHO ENJOY PAIN, ILSA ALWAYS HURTS THE ONE SHE LOVES

I KNOW SOME LIBERALS IN CONGRESS I'D LIKE HER TO MEET.

YOU BOYS GETTIN' ALL THIS?

SUDDENLY, HONEY REALIZES WHO SHE'S DEALING WITH!

LIBERALS? CONGRESS? OMIGOSH, THAT'S NO ARAB! THAT'S JERRY FALLGUY, THE MORAL MAJORITY KINGPIN AND AMERICA'S FULL-TIME ASSHOLE! AND THE OTHER GUY IS RONNIE RAYGUN HIMSELF!

JERRY, IF WE'RE GOING TO PIN THIS RAP ON THEM, YOU'LL HAVE TO GET HONEY TO DISCUSS PRICE!

RIGHT!

UP IN HER BEDROOM, HONEY CALLS THE PHONY ARABS' BLUFF.

SINCE YOU BOYS HAVEN'T SPOKEN UP, I GUESS YOU'RE LOOKING FOR SOME STRAIGHT SEX.

CHRISTINA, WHY DON'T YOU MAKE MR. SCAMOUL COMFORTABLE WHILE I TAKE CARE OF MR. ABDUL HERE

B-B-BUT WE HAVEN'T TALKED...

DIRTY? DON'T WORRY, WE WILL.

BUT WE HAVEN'T DISCUSSED ... HOW MUCH!

NO PROBLEM. I CAN TAKE IT ALL.

THIS IS ONE FED SET-UP I'M GOING TO BLOW WIDE OPEN!

AND SHE PLAYS IT.

YOU WANT MONEY FOR SEX??!! THAT'S AGAINST THE LAW! CHRISTINA, CALL THE COPS! THESE GUYS ARE GIGOLOS!

RONNIE! ABORT THE MISSION.

I THOUGHT YOU WERE AGAINST ABORTION, JERRY!

...GAGING FALLGUY ...UALLY BEFORE... ...LK OF PAYMENT ... CAN TAKE PLACE. HONEY SUCCESS-FULLY DEFUSES ANY PROSTITUTION CHARGE. BUT SHE'S GOT ONE MORE CARD TO PLAY.

WAIT!

HOW ABOUT THE MONEY?

BEAT AT ITS OWN GAME, THE FBI MAKES A HASTY RETREAT.

I'M FED UP WITH THE GOVERNMENT WASTING TAXPAYERS' MONEY TRYING TO LEGISLATE AND REGULATE MORALITY! I HOPE FALLGUY AND HIS CREW LEARNED A LESSON!

FBI-1

LISTEN, JERRY, IF THE INCRIMINATING STUFF IS ONLY ON TAPE, I KNOW A GUY NAMED NIXON WHO CAN HELP YOU!

THE END

PLAINTIFF'S TRIAL EXHIBIT 9

LETTER FROM ROBERT O. JORDAN
TO LARRY AND ALTHEA FLYNT

Compton Advertising, Inc.
625 Madison Avenue
New York, New York 10022
Tel. (212) 754-1100
Robert O. Jordan, Chairman

October 7, 1983

Larry & Althea Flynt
Publishers
Hustler Magazine, Inc.
2029 Century Park East
Suite 3800
Los Angeles, CA 90067

Dear Mr. & Mrs. Flynt:

We are the advertising agency of Campari USA Inc., exclusive importers of Campari. We note with great shock and dismay your November 1983 publication in which you include an 'advertisement' using the Campari product, both its label and trade-mark.

Neither we nor our principals have ever authorized you to make such a use, or any use at all, of the Campari product, in any of your publications, and you never had our, or our principals', permission or consent to do so.

Demand is hereby made upon you to cease and desist from any further use or publication using the name, trade-mark and label of Campari in any commercial manner or for any purpose.

Your present publication has caused much embarrassment and damage.

Very truly yours,

/s/ Robert O. Jordan
Robert O. Jordan

ROJ:sp

RECEIVED
OCT 12 1983
LEGAL DEPT

PLAINTIFF'S TRIAL EXHIBIT 11
EXCERPT FROM FEBRUARY 1980
ISSUE OF *HUSTLER MAGAZINE*

Good as Gold

This photo was taken at the opening of the 24K nightspot in New York City. The smut trio of Mark Stevens, Jill Monro and Toni Rose were taking a break from their performance when the boys in blue pulled up. But the police seemed to enjoy [illegible] sneak peek, and left without hassling anyone. 24K is trying to popularize "disco-burlesque"—sexy live shows set to a disco beat.



Obituary



DIED: Miss Piggy, beloved Muppet and popular TV personality, in a fiery car crash. Hollywood sources report that the accident could be linked to the television star's high-on-the-hog lifestyle. The personable porker was rumored to be hitting the trough quite heavily to escape the pressures of fame. She is survived by 100 brothers and sisters.

Most Tasteless Cartoon



"Just pick the scabs, honey; then I'll be good and wet!"

Harvey

Harvey/For Loving People is a new skin magazine dedicated to "bringing back the Forties" for "the guy who isn't a stud." Those are the words of Publisher Harvey Shapiro, formerly marketing director at Larry Flynt Publications. Shapiro seemed to feel that it's good distribution—not top-quality writing and photography—that's made HUSTLER so successful. That lack of respect for content shows in the pages of the magazine he's named for himself; one photo-set features five pages of kissing faces, which weren't much of a turn-on even back in the '40s.

Harvey is available for $2.75 at your local newsstand or by mail from *Harvey/For Loving People*, Subscription Department, 450 Seventh Avenue, Suite 2305, New York, New York 10001.



HUSTLER Update



JERRY FALWELL
Nov. 1979
This vicious hypocrite became Asshole of the Month after he preached that Larry Flynt's shooting and the death of some *Playboy* staffers in the tragic DC-10 crash in Chicago were the work of the Lord. Unfortunately, religious leaders like Falwell have a lot of other assholes to keep them company. Many of them obviously belong to the Religious Heritage of America, which recently voted Falwell Clergyman of the Year. The group is supposedly dedicated to honoring those who best exemplify the religious principles on which the U.S. was founded.



THE CHOSEN FEW
March 1978
We exposed the Reverend Sun Myung Moon as a religious shyster who's been linked to Koreagate and other attempts to corrupt the U.S. political process. It appears Moon is up to his old tricks again; *New York* magazine is charging that Moon's Unification Church is financially supporting the Cuban nationalist movement. Moon's cronies allegedly channeled money for legal fees to three Cuban nationalists convicted for their role in the brutal political assassination of Chilean Ambassador Orlando Letelier.

And there's more—the *New York Post* alleges that the Reverend is the secret moneyman behind the new film *Inchon*, a Korean War epic. Moon reportedly wants the movie for propaganda purposes and to increase his value to the South Korean government.

Contributors

HUSTLER pays $100 for interesting visuals and stories for Bits & Pieces. We buy all rights to material accepted for publication, but will return art on request (enclose a stamped, self-addressed envelope). For February, $100 and thanks to Neke Carson, Jim Riley, Edy Rollin and Dennis Warren.

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PLAINTIFF'S TRIAL EXHIBIT 12A
EXCERPT FROM NOVEMBER 1981
ISSUE OF *HUSTLER MAGAZINE*


DEAR JERRY FALWELL,
I WANT TO THANK YOU FOR THE INSPIRATION AND COMFORT YOUR TELEVISION BROADCASTS GIVE ME.
I AM ENCLOSING THE REMAINDER OF MY SOCIAL SECURITY MONEY TO HELP YOU KEEP UP YOUR FINE WORK AS I KNOW YOU NEED IT...
DUANE TINSLEY

PLAINTIFF'S TRIAL EXHIBIT 12B
EXCERPT FROM NOVEMBER 1981
ISSUE OF *HUSTLER MAGAZINE*

Honey

WHEN HONEY TAKES A VAN TO THE DRIVE-IN, THE ACTION ON THE SCREEN TAKES A BACKSEAT TO THE ACTION ON THE FRONT SEAT!

HMM! WHAT A BIG CLUB YOU HAVE!

I LOVE MOVIES ABOUT THE STONE AGE — ESPECIALLY THE WAY CAVEMEN DRESSED. WHICH REMINDS ME — DID YOU BRING SOME SKINS?

I WONDER WHAT THOSE CAVEGUYS USED FOR PROTECTION WHEN THEIR GIRLFRIENDS WENT OFF THE PILL FOR A WHILE?

BIRTH CONTROL DIDN'T START UNTIL THE TROJANS CAME ALONG.

DON'T YOU MEAN THE GREEKS?

THAT'S ANOTHER METHOD THEY USED.

AFTER THE MOVIE, IT'S TIME FOR INTERMISSION.

♪ LET'S ALL GO TO THE LOBBY... ♪

GREAT PERFORMANCE, HUH?

STARTED SLOW, BUT IT BUILT TO A TERRIFIC CLIMAX!

Art: Tom Garst Text: Bruce Helford

AS HER DATE LEAVES TO GET POPCORN, HONEY DRIFTS OFF INTO A TIME WHEN MEN WERE MEN... AND DINOSAURS WERE NERVOUS.

IT MAKES THEM FEEL GOOD, IT MAKES US FEEL GOOD, AND IT'LL HELP PAY THE BILLS! I SAY WE SHOULD DO IT!

LAST NIGHT GUNGA OFFERED TO SHARE HIS LINES OF DRIED SLOTH DROPPINGS WITH ME I'D DO IT! I KNOW HE'D PAY!

THAT SETTLES IT! WE'LL START TOMORROW!

THE NEXT MORNING, THE GIRLS START THE OLDEST PROFESSION!

HONEY'S PLEASURE CAVE

"Put your woolah down and you get to fool around."

*AROUND THE WORLD (AS WE KNOW IT)... 5 PELTS
*RIM JOB 4 PELTS
BATHED.... 10 PELTS
UNBATHED.. 15 PELTS
*BLOW JOBS
WITH MOUTH... 3 PELTS
WITH CLUB ... 1 PELT

OKAY, GIRLS! OPEN UP FOR BUSINESS!

AND THE BUSINESS ROLLS IN!

WOW! I DIDN'T EXPECT THIS KIND OF RESPONSE!

THIS COULD BE BIGGER THAN THE WHEEL!

INSIDE THE CAVE - THE WORLD'S FIRST ORGY!

???????

MY WOOLLY MAMMOTH DOESN'T UNDERSTAND ME.

OOOH! YOU ARE SO SMOOTH — AND HARD!

OUTSIDE THE CAVE, A TRIBAL FANATIC IS STARTING ANOTHER TRADITION — REPRESSION!

THOSE WOMEN ARE BAD MEDICINE! THEY SAY SEX IS FUN! PRETTY SOON THEY'LL TELL US WE CAME FROM APES! THE GODS ARE ANGRY! WE WILL BE DESTROYED!

HONEY'S PLEASURE CAVE

SEEING THAT THE CROWD IS BECOMING HOSTILE, BROWN SUGAR RUSHES TO WARN HONEY.

HONEY, THERE'S SOME PEOPLE OUTSIDE AND THEY'RE FIT TO BE TIED!

HMMM! THAT MIGHT BE WORTH LOOKING INTO!

BUT THE WARNING COMES TOO LATE!

WE NEED A SACRIFICE TO APPEASE THE GODS! WE WILL KILL THE RED-HAIRED ONE!

NO! NO! WE WEREN'T HURTING ANYBODY!

HONEY IS TAKEN TO THE VOLCANO WHERE THE CAVEPEOPLE BELIEVE THE GODS DWELL.

LISTEN, GODS! WE KNOW THAT SEX IS DIRTY! FOR HER SINS WE SACRIFICE THIS SHE-DEVIL IN THE NAME OF THE PRIM-ITIVE MAJORITY! WE...

KILL HER!

THAT'S THE LAST THING YOU'LL EVER SEE, SEX-DEMON!

NOOOOOOOOOOO!

HONEY! HONEY!

IN A LAST ACT OF DEFIANC SHE PULLS OFF HER EXECU TIONER'S MASK!

I WANT TO SEE JUST WHO YOU ARE!

HUH?

JERRY FARWEL

HONEY'S DATE RETURNS AND AWAKENS HER FROM THE NIGHTMARE.

HONEY! ARE YOU OKAY? SORRY I TOOK SO LONG. BUT THE LINES... OOPS!

IT BURNS! THE LAVA! NO!... WAIT!...

IT'S ONLY HOT BUTTER!

WHEW!

A LITTLE LOVE AND TENDERNESS SOON DISPEL THE DREAM.

I THINK THIS IS WHERE I CAME IN. FEEL BETTER NOW?

MUCH BETTER! I NEVER REALIZED H MANY PREHISTO IDEAS ARE ST WITH US TODA IT'S A GOOD THING I DON LIVE NEAR MOUNT ST HELENS!

THE END

PLAINTIFF'S TRIAL EXHIBIT 13
EXCERPT FROM DECEMBER 1981
ISSUE OF *HUSTLER MAGAZINE*

The Moral Majority Art Gallery

Beauty is in the eyes of the beholder . . . and so is obscenity. But the Moral Majority has been trying to force America to look at things through *its* eyes. These rabid censors want to remove sex and violence from TV, and nude women from magazines. Where will it end? Probably where it began, in the masterpieces whose themes were the beauty of the human body and the suffering of the human condition: in other words, sex and violence. Here's how the classics would look if the Moral Majority had its way.





The Wimbledon of Saint Sebastian

(The Martyrdom of Saint Sebastian)

This painting depicts the last moments of Saint Sebastian, a Roman soldier who was used for archery practice because of his religious beliefs. A nice plot, but it would never get past the Coalition for Better Television. Too much violence. The new version not only blunts the slings and arrows of misfortune, but also gives Saint Sebastian a nice hobby, playing tennis.

1832

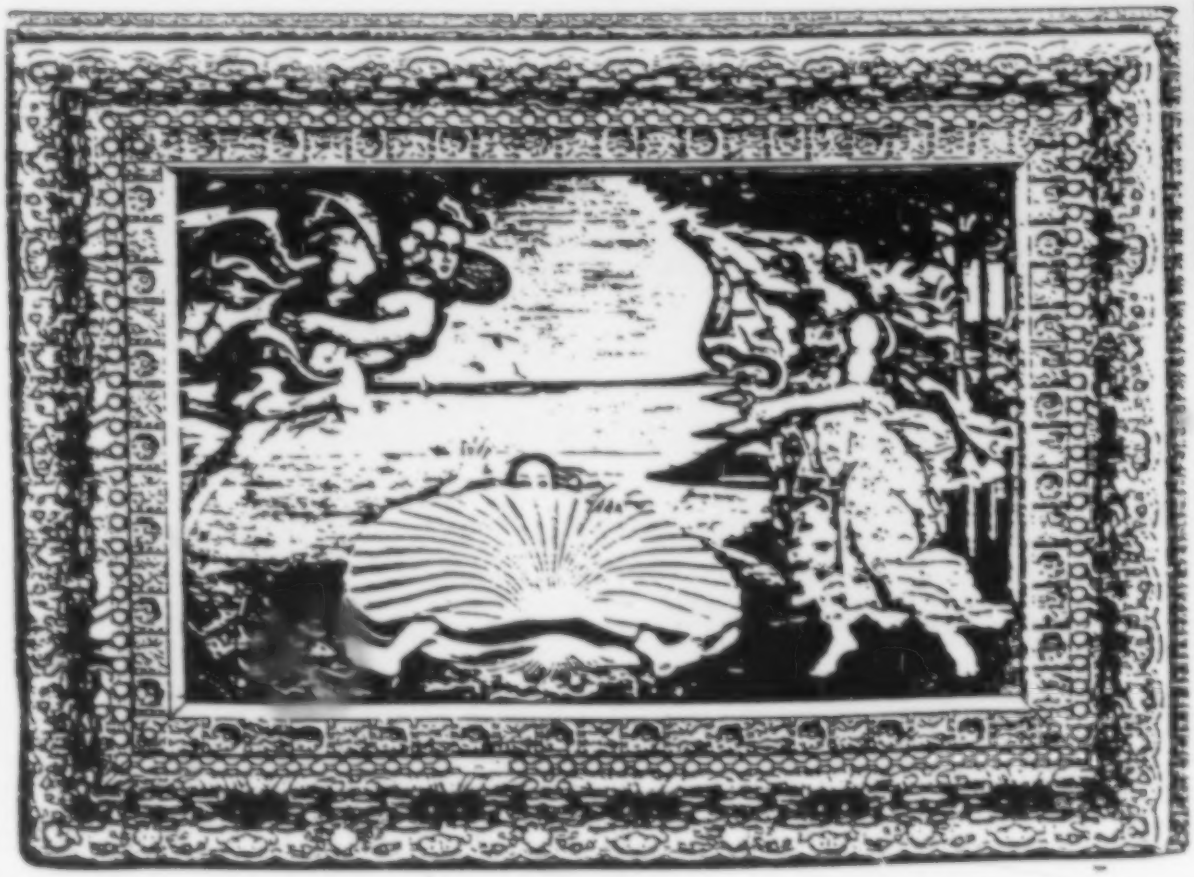


The Death of Silverman

(The Death of Marat)

In the original, French revolutionary Jean-Paul Marat has been stabbed in the back by madwoman Charlotte Corday. In the "moral" retouch, the leader of the "jiggle-show" movement, Fred Silverman, has been stabbed in the back by the bosses at NBC. The violence is obviously justified by the appropriate victim. Touche!







Clam Up

(The Birth of Venus)

Brilliant Italian artist Sandro Botticelli found the nude goddess Venus to be an exquisite subject. The Moral Majority wouldn't agree. By its standards, this is obscene pornography. But a tastefully retitled and censored *Birth of Venus* is really more like an abortion.



The Decent Descent From the Cross

(The Descent From the Cross)

Whether Christ was really clothed that way or not moralists aren't going to have Him pulled down off the cross in diapers. Leave it to them to decide what the well-dressed Messiah was wearing on that eventful day.







An Allegation

(An Allegory)

Moral Majority leader Jerry Falwell may not know much about art, but he knows what he doesn't like. Although the painting relates events from Greek mythology, Jerry seems bent on hitting into this double play. If that kid is smart, he'll keep his balls out of the strike zone.

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PLAINTIFF'S TRIAL EXHIBIT 14
EXCERPT FROM FEBRUARY 1982
ISSUE OF *HUSTLER MAGAZINE*



"Send someone down to see Falwell. Tell him to get off his power trip!"

PLAINTIFF'S TRIAL EXHIBIT 15
EXCERPT FROM MARCH 1983
ISSUE OF *HUSTLER MAGAZINE*



"That's Jerry Falwell's yacht!"

PLAINTIFF'S TRIAL EXHIBIT 17
EXCERPT FROM FEBRUARY 1984
ISSUE OF *HUSTLER MAGAZINE*

FALWELL* says:
"ALL THE DIRTY
COPY... IT'S HOT!"

"... NOAH FLASHING HIS KIDS... SUSANNAH BEING RAPED BY THE ELDERS... SODOMY IN GOMORRAH... MEN WASHING EACH OTHER'S FEET... I'VE NEVER SEEN SO MUCH SEX IN ONE BOOK!"

*– ORAL ROBERTS**

The Bible by Satan

A RICH, SWEEPING SAGA OF ILLICIT LOVE UNDER THE WATCHFUL EYE OF A DEITY WHOSE PASSIONS WERE BOUNDLESS!

* PARODY

PLAINTIFF'S TRIAL EXHIBIT 18
EXCERPT FROM JUNE 1976
ISSUE OF *HUSTLER MAGAZINE*

PUBLISHER'S STATEMENT



A COURT WITH NO APPEAL

A recent decision handed down by the Supreme Court concerning freedom of the press is further evidence that many of the individual liberties that we gained under the liberal Warren Court will be stripped away by the Nixon-appointed Burger Court. Those of us who thought we had suffered the last of Nixon's tinhorn dictatorship when he was forced to resign in disgrace have been proven wrong. The same tyrant who bequeathed us Gerald Ford also left us a conservative Supreme Court that will, no doubt, eventually deprive us of all our First Amendment rights to freedom of expression. Bearing in mind that Supreme Court justices are appointed for life, it will probably be two generations or more before we overcome the lingering effects of Nixon's efforts to establish himself as a world dictator.

The case in question was a libel suit brought against *Time* magazine by Mary Alice Firestone, the ex-wife of Russell Firestone, heir to the great Firestone tire fortune. *Time* erroneously reported that Russell Firestone was granted a divorce from Mary on grounds of "adultery and extreme mental cruelty." Even though the divorce court's decision had *not* included adultery among the grounds for the divorce, much of the trial testimony left one with the impression that if Mary Firestone had as many dicks sticking out of her as she'd had stuck into her, she would look like a porcupine. She sued and won a $100,000 judgment because of *Time*'s honest mistake in reporting the facts of an extremely lengthy and murky divorce decision.

Here's where the newly conservative Supreme Court came in. In its appeal, *Time* argued that Mrs. Firestone was a "public figure" and thus had to establish "actual malice" (knowingly publishing false statements) on *Time*'s part in misreporting the grounds of her divorce. The "public figure" distinction had been established by the Warren Court as a means of giving the press some legal "breathing space" in reporting and editorially commenting on persons who attain "special prominence in the affairs of society."

Incredibly, the Burger Court denied *Time*'s contention that Mrs. Firestone was a "public figure"—despite the fact that her divorce suit had been exhaustively covered in the newspapers, and despite the fact that Mrs. Firestone had, during her marriage, subscribed to a press clipping service in order to follow her brilliant "career" in the society pages. By this ruling, the Burger Court has restricted the press's protection under the libel laws to the point where a publication cannot safely comment on any well-known person unless he is a public official. That provision itself will probably be the next thing to go. Thereafter, all governmental officeholders and bureaucrats will be safely shielded from public criticism.

What does all this legal hairsplitting have to do with you? Simply this: The threat of libel action is the traditional gag that rich or politically powerful people use to prevent unpleasant opinions from being voiced about them in the press. This new Supreme Court decision has already thrown many publishers, editors, and journalists throughout the country into a turmoil: they are afraid to report *anything* other than the most bland, inoffensive bullshit about *anybody* for fear of being slapped with lawsuits that might end up in the same Supreme Court that handed down this ridiculous decision. The next time some new version of Nixon tries to make himself King of America, journalists like Woodward and Bernstein will be powerless to stop him. They'll be reduced to reporting on how good he looks in his crown.

How will this latest restriction of our individual rights affect HUSTLER and its no-bullshit reporting policy? It won't. We'll continue to report matters as we see them in the same forthright, down-to-earth manner. Whether a person is a private citizen or a public figure, if he's an asshole, a shithead, or a scumbag, that's just the way you'll see him in HUSTLER.

I decided at the beginning that if HUSTLER was to be a bear, it had damn well better be a grizzly. If this means that the presses that print HUSTLER must be halted because of our editorial stance, then let them be halted. There will be no compromises.

Larry Flynt

Editor and Publisher

PLAINTIFF'S TRIAL EXHIBIT 20
EXCERPT FROM DECEMBER 1984
ISSUE OF *HUSTLER MAGAZINE*



MEETING THE CHALLENGE

I'm happy to be out of prison in time to write this month's *Publisher's Statement*. In my ten years of publishing HUSTLER, I've had a lot of ups and downs. I've been incarcerated three times for defending the First Amendment. I've been shot and paralyzed because the power elite disagrees with my philosophy. In this our Tenth Anniversary year I have tried with difficulty to look back on HUSTLER's brief but turbulent history. My intention from the beginning was to deal openly and honestly with sex and have some fun in the process. I guess I was naive to feel that freedom of expression, including that of sexual expression, should be absolute, that censorship was something only the Communists did, that a free press was a right we Americans could take for granted.

Every step of the way has been a struggle–a never-ending battle to keep HUSTLER on the newsstands without compromising the quality of its editorial content. I'm not just talking about the photographs. We seem to have more censorship problems over the outrageousness of our articles and cartoons than anything else, especially if they have religious or political overtones. But I'm not going to allow these problems to dissuade me from continuing to provide you with the best possible magazine you can buy.

The second half of '80s offers an interesting challenge, and HUSTLER is prepared to meet this challenge. I'm the first to admit that in the past year HUSTLER has fallen short of delivering the goods, and the sales have reflected its shortcomings. It would be easy to blame HUSTLER's weak editorial package on the fact that I was in prison, but that would be a cop-out.

Shortly after I was imprisoned, there was a power struggle for control of my company. When my wife, Althea, lost the conservatorship bid in California State Court, she refused to participate in the running of HUSTLER. With Althea and myself both absent, the magazine became nothing more than one of our second-rate competitors. But Althea and I have both returned, and in the future you can expect your old HUSTLER back with some fresh new ideas. You know what you got without our presence. Now, in the coming months, judge for yourself just who and what makes a difference at HUSTLER.

Larry Flynt

Publisher & Editor

PETITIONER'S

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1278

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. AND LARRY C. FLYNT,

Petitioners,

v.

JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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June 15, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment defenses applicable to libel are applicable to claims of intentional infliction of emotional distress based upon publication of alleged injurious falsehoods.

A. Whether First Amendment protections for opinion and rhetorical hyperbole preclude a public figure prominent in the nation's political life from recovering on a claim of intentional infliction of emotional distress due to alleged injurious falsehoods in a parody which a jury has found could not reasonably be understood as making any statements of fact about the public figure.

B. Whether the First Amendment requirement of "actual malice" precludes a public figure prominent in the nation's political life from recovering on a claim of intentional infliction of emotional distress due to alleged injurious falsehoods in a parody unless he proves by clear and convincing evidence that the parody was published with knowing or reckless falsity.

C. Whether a public figure prominent in the nation's political life may recover substantial compensatory and punitive damages because he suffered some hurt feelings due to alleged injurious falsehoods in a parody when the parody caused no harm to his reputation.

2. Whether a public figure plaintiff prominent in the nation's political life may prevail on a claim of intentional infliction of emotional distress based upon alleged injurious falsehoods in a parody when the only proof of emotional distress consists of evidence that the plaintiff was angered and that his optimism and enthusiasm were somewhat diminished.

A. Whether the Court below correctly found that such evidence was sufficient to meet the requirement of the tort that the plaintiff's emotional distress be severe.

B. Whether the First Amendment permits an award of substantial compensatory and punitive damages based upon such a showing.

THE PARTIES

Petitioners (defendants below) are Hustler Magazine, Inc. and Larry Flynt, the corporate and individual publishers, respectively, of Hustler Magazine. Hustler Magazine, Inc., a California corporation, is a corporation sharing common ownership with L.F.P., Inc., a California corporation. Respondent (plaintiff below) is Jerry Falwell.

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v.

JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix A to Petition for Writ of Certiorari--hereinafter "Pet. App. A.") is reported at 797 F.2d 1270 (4th Cir. 1986). The order denying rehearing en banc, together with the dissenting opinions of five of the eleven judges of the United States Court of Appeals for the Fourth Circuit (Pet. App. B), is reported at 805 F.2d 484 (4th Cir. 1986). The opinion of the United States District Court for the Western District of Virginia (Pet. App. D), which denied a motion for judgment notwithstanding the verdict, is not reported.

JURISDICTION

The opinion of the Court of Appeals was dated August 5, 1986. The Court denied petitioners' petition for rehearing en banc on November 4, 1986. The petition for a writ of certiorari was filed on February 2, 1987 and was granted on March 30, 1987. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

This lawsuit was filed by one of the nation's most prominent public and political figures, Jerry Falwell, based upon the publication in Hustler Magazine of a parody featuring his name and likeness. The Complaint, as originally filed in the United States District Court for the Western District of Virginia, alleged libel, invasion of privacy, and intentional infliction of emotional distress. Jurisdiction was based upon diversity of citizenship.

The ad parody (Pet. App. E) was accurately described by the Court of Appeals in its opinion:

> The "ad parody" which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about their "first time." They mean, their first encounter with Campari Liqueur, but there is double entendre with a sexual connotation. In the Hustler parody, Falwell is the celebrity in the advertisement. It contains his photograph and the text of an interview which is attributed to him. In this interview Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and Falwell appears as a hypocrite and habitual drunkard. At the bottom of the page is a disclaimer which states "ad parody - not to be taken seriously." The parody is listed in the table of contents as "Fiction; Ad and Personality Parody."

797 F.2d at 1272.

Following denial of motions for judgment on the pleadings and summary judgment, the case proceeded to trial before a jury on December 3, 1984. The testimony of five witnesses involved in the publication of the parody was offered.[1]

The testimony of these witnesses revealed that the original idea for the parody was offered by a free lance writer named Michael Salisbury in response to a request for suggested topics for ad parodies.[2] Aside from the first line, which was suggested by Salisbury, the text of the parody was written by Bruce Helford, an editor of the magazine.[3] Thus, neither the

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1. Kelly Garrett and Richard Warren Lewis, editors of the magazine, testified at trial, as did Larry Flynt, editor in chief and publisher of the magazine. Plaintiff also offered deposition testimony of Flynt. Bruce Helford, the author of the parody, and David Kahn, the magazine's general counsel, testified by deposition.
2. Helford testimony, Joint Appendix (hereinafter "J.A.") ___ [Joint Appendix on Appeal (4th Cir.) 1400, 1401-03, 1404-05]; Lewis testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 972]; Flynt trial testimony, J.A. ___ [Joint Appendix on Appeal (4th Cir.) 1218-1219, 1220, 1221-22].
3. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1405-06, 1407]; Flynt trial testimony, J.A. ___ [Joint Appendix on Appeal (4th Cir.) 1221-22]

idea of a Campari-Falwell parody nor any of the text of the parody originated with defendant Flynt. The intent was to publish satire and parody. The purpose of the parody was to poke fun at Campari liqueur for its advertising campaign based upon interviews with celebrities about their "first time."[4] The parody was not published out of any personal animosity toward Falwell or with any intent to hurt him.[5] Falwell was used as the celebrity in the parody for humorous effect because it was obvious that he would never actually engage in the activities related in the parody or make the statements attributed to him therein.[6] The disclaimer, "Ad Parody - Not to Be Taken Seriously," was added to make clear what was already obvious: that it was not a genuine ad or interview with Falwell. In fact, most of the editors thought such a disclaimer to be unnecessary precisely because the item was so obviously a parody.[7] None of the editors believed that any readers would actually take the parody seriously or interpret it to be a true statement of fact or a genuine interview with

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4. Lewis testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 973]; Flynt trial testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1223-4]
5. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1412]; Flynt trial testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1241]
6. Flynt trial testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1224-5, 1226-30]
7. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1409]; Garrett testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1421-23]; Lewis testimony, J.A. ___ [Joint Appendix on Appeal (4th Cir.) 973]

Falwell.[8] The consensus of all the editors was that the Campari item was obviously a parody.[9] It was believed that it would be understood as humor.[10] The magazine often published ad parodies, including other parodies in the same issue of the magazine in which the Campari parody appeared.[11] The magazine did not normally publish any "national advertising," i.e. actual ads of nationally known products such as Campari, which might lead readers to believe the Campari parody was a genuine ad.[12] Thus, the record demonstrates that defendants' intent in publishing the parody was not to publish any false statements of fact about Falwell or to cause him any harm, but simply to make a humorous social and political comment which would not be understood as a serious interview with Falwell.[13]

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8. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1409, 1412-13]; Lewis testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 973, 975-77]; Garrett testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1423]; Flynt trial testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1232]
9. Garrett testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1421-22]
10. Garrett testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1427-28]
11. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1415-16]; Lewis testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 980]
12. Helford testimony, J.A. ____[Joint Appendix on Appeal (4th Cir.) 1414]
13. The sole source of any evidence of ill will is found in the deposition testimony of Flynt, which had been taken six months before the trial when Flynt was in prison and in the grips of a manic-depressive disorder (from which he had recovered by the time of the trial). It is the testimony from this deposition which is cited by the Court of Appeals opinion as evidence of malice and intent to harm. See 797 F.2d at 1273. The district court had originally excluded this deposition, which was on videotape, from evidence because it had concluded that Flynt had not been competent to testify at the time. The order excluding the deposition from evidence and [footnote continued on next page]

The only evidence relating to emotional distress suffered by Falwell was his own testimony that he was very angry[14] and "felt like weeping," but did not,[15] and the testimony of a close associate, Dr. Ron Godwin, that "in subtle ways" Falwell's demeanor and behavior had been affected, although Godwin could not articulate how they had been affected,[16] that "a certain degree" of Falwell's "enthusiasm and optimism, ability to concentrate, to focus on the myriad details of organizations such as [Moral Majority] ... was diminished,[17] and that Falwell was "preoccupied."[18]

In contrast to this testimony relating to emotional distress, Falwell admitted that his busy schedule had not been cut back at all as a result of his emotional distress[19] and that he had continued to follow a regime in which he worked from 5:45 a.m. to midnight or 1:00 a.m. daily and traveled 400,000 miles and gave 1200 speeches per year,[20] a schedule which Godwin described as "exhausting."[21] He had not sought

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[footnote continued from previous page] reciting the grounds therefor is reproduced at J.A. ____ [Joint Appendix on Appeal (4th Cir.) 470, 471-73.] At trial, the court reversed itself and permitted the videotape to be played. Ample testimony that Flynt had not been competent at the time of the deposition was given by Dr. Saul Niedorf, his treating psychiatrist who testified at trial. Dr. Niedorf's testimony may be found in the trial transcript for Dec. 6, 1984, at pp. 200-280.

14. J.A. ____[Joint Appendix on Appeal (4th Cir.) 793]
15. J.A. ____[Joint Appendix on Appeal (4th Cir.) 794]
16. J.A. ____[Joint Appendix on Appeal (4th Cir.) 946]
17. Id.
18. J.A. ____[Joint Appendix on Appeal (4th Cir.) 943]
19. J.A. ____[Joint Appendix on Appeal (4th Cir.) 807]
20. J.A. ____[Joint Appendix on Appeal (4th Cir.) 765]
21. J.A. ____[Joint Appendix on Appeal (4th Cir.) 941]

any form of counseling to deal with his emotional distress[22] and was used to being subjected to criticism by various publications.[23] Godwin admitted that Falwell exhibited no "overt emotion" in response to the parody.[24]

The only objective evidence relating to Falwell's reaction to the ad parody was his mailing of hundreds of thousands of copies of the parody to his supporters as part of a fundraising campaign for two organizations headed by Falwell, Moral Majority and Old Time Gospel Hour. The parody was a very effective fundraising vehicle, bringing in approximately $800,000 in contributions.[25]

At the close of the evidence the Court granted defendants a directed verdict on the invasion of privacy claim. The jury returned a verdict for the defendants on the libel claim, specifically finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. (Pet. App. C at C1.) However, the jury found that defendants had intentionally inflicted emotional distress upon Falwell and awarded him $100,000 in compensatory damages. (Id. at C3.) The jury also awarded $50,000 in punitive damages against each of the two defendants, Hustler Magazine, Inc. and Larry Flynt. (Id. at C4.)[26] Thus, Falwell obtained a judgment in the amount of

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22. J.A. ____[Joint Appendix on Appeal (4th Cir.) 806]
23. J.A. ____[Joint Appendix on Appeal (4th Cir.) 814]
24. J.A. ____[Joint Appendix on Appeal (4th Cir.) 948]
25. J.A. ____[Dec. 4, 1984 trial transcript, pp. 58, 60, 65]; see Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).
26. The jury returned a verdict in favor of a third defendant, Flynt Distributing Company, Inc.

$200,000.

Post-trial, defendants moved for judgment notwithstanding the verdict, arguing, inter alia, that the law of libel provided the exclusive remedy for respondent and that its defenses and protections could not be evaded by pleading intentional infliction of emotional distress; that because the ad parody was not published with "actual malice," i.e. knowing or reckless falsity, the First Amendment barred recovery under the theory of intentional infliction of emotional distress; that because the ad parody consisted of opinion and rhetorical hyperbole, recovery was barred under any tort theory; and that plaintiff had not proved the elements of the tort of intentional infliction of emotional distress, including the requirement that Falwell's emotional distress be severe. The District Court denied the motion in an unreported opinion on April 19, 1985. [Pet. App. D.] The court mentioned the First Amendment defenses only in passing, dismissing the argument that plaintiff's recovery "would chill legitimate, protected speech" with the comment that "unique facts here ... do not lend themselves to a broad statement of law." [Pet. App. D. at D9.] Moreover, liability was predicated not upon the publication of the parody, but upon its use as "vehicle" for defendant Flynt's "conduct." Id. at D8. Addressing the elements of the tort of intentional infliction of emotional distress, the court held that the requirement of intent was satisfied by Flynt's deposition testimony to the effect that he wanted to upset Falwell and attack his integrity. Id. at D4. Characterizing the ad parody as a "personal attack [in the]

form of a graphic mischaracterization of plaintiff's relationship with his own mother and of his personal moral practices," the court concluded that there was sufficient evidence for the jury to find that the publication was outrageous and that Falwell's emotional distress was "severe." Id. at D5.

Defendants appealed, raising the same issues presented to the district court. Addressing the First Amendment issues, the Court of Appeals concluded that although the "actual malice" standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), must be met in order to prevail on Falwell's claim of intentional infliction of emotional distress, that standard "merely increases the level of fault" which must be proved with respect to the traditional elements of the tort. Thus, actual malice in this context does not mean "knowledge of falsity or reckless disregard of the truth," but simply requires that the defendants must have acted intentionally or recklessly. 797 F.2d at 1275. The Court concluded that actual malice in this context thus does not require knowing or reckless falsity.

Because the jury had found that defendants had engaged in such intentional conduct, the Court rejected defendants' "actual malice" defense. The Court did not engage in an independent review of the record on this issue or require proof by clear and convincing evidence.

The Court quickly dismissed the defense that the parody was opinion and rhetorical hyperbole, concluding that there was no need to consider whether the statements were opinion when the jury had found defendants' conduct to be outrageous. Id., 1276.

On November 4, 1986, the Court denied a petition for rehearing en banc by a vote of 6 to 5. Two dissenting opinions were filed (Pet. App. B.) and are reported at 805 F.2d 484. Judge Wilkinson, in a lengthy dissent joined by three other members of the Court, warned that to permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law since New York Times v. Sullivan, supra, and that permitting a public figure to recover for emotional harm based upon political satire or humor threatens to stifle "the long tradition of satiric commentary" and political debate. 805 F.2d at 484, 487. He observed that the Court's ruling would permit use of the tort of intentional infliction of emotional distress to "recover for a perfectly true statement," that it ignored repeated statements of this Court that "a defendant cannot be liable merely because he intended his statement to inflict harm," and that it "gives the jury almost unlimited discretion" to determine what speech is acceptable and what speech is outrageous (and therefore tortious). 805 F.2d at 488-89.

SUMMARY OF ARGUMENT

By permitting a public figure who cannot prove libel to recover substantial compensatory and punitive damages for alleged injurious falsehood based upon the alternative theory of intentional infliction of emotional distress, the Court of Appeals has eviscerated the protections which this Court recognized in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny.

The protections afforded to the press by the First Amendment do not depend upon labels created by state law. Id. at 289. The First Amendment forbids a public figure from recovering for libel based upon rhetorical hyperbole or statements which are not published with knowing or reckless falsity, and those constitutional defenses cannot be circumvented simply by pleading an alternative theory of relief. To hold otherwise is to render them meaningless.

The defenses that a statement is rhetorical hyperbole and opinion, and that it was not made with knowing or reckless falsity, find their source not in the common law of libel but in the First Amendment. They are based on a "profound national commitment" to "uninhibited, robust, and wide-open" debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. at 271. They apply whether a public official claims libel or intentional infliction of emotional distress.

In this case, the jury concluded that the ad parody "could [not] reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated." [Pet. App. C at C1.] Plaintiff has not challenged this finding; nor has he challenged the verdict for the defendants on his libel claim. This Court is thus presented with a case where a public figure has recovered substantial damages for alleged injurious falsehood based upon a non-libelous publication which consisted of rhetorical hyperbole and opinion and which was not published with knowing or reckless falsity.

Because, as the jury found, the parody contained nothing which would be understood as a statement of fact about Falwell, it falls within this Court's decisions defining constitutionally protected rhetorical hyperbole. See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970). The parody is simply an example of humorous opinion which has a long tradition in American political and social commentary. Questions of good taste are irrelevant. First Amendment principles clearly immunize it from liability, whether for libel or for other torts.

The Court of Appeals incorrectly concluded that in a suit for intentional infliction of emotional distress based upon a publication containing allegedly injurious falsehoods, the "actual malice" required by the First Amendment is satisfied when the defendants' conduct was "intentional or reckless." This flies in the face of this Court's pronouncements that the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to harm by publishing a falsehood about the public figure. Garrison v. State of Louisiana, 379 U.S. 64, 73-74 (1964).

Moreover, because there was no false statement of fact about plaintiff in the ad parody, an essential ingredient of New York Times v. Sullivan "actual malice" is missing. See Letter Carriers v. Austin, supra, 418 U.S. at 284. Further, there was no knowing or reckless falsity in the ad parody because defendants subjectively (and correctly) believed that

they were not publishing anything which would be interpreted as a representation of fact about Falwell.

Even if one could accept the Court of Appeals' view that intent to inflict emotional distress satisfies First Amendment requirements, an independent review of the record, Bose v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984),--which the Court of Appeals failed to conduct--does not reveal clear and convincing evidence, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), of such "actual malice." The substance of the evidence was that defendants simply intended to publish humorous social and political commentary.

The law of libel is well equipped to deal with publications such as the ad parody in this case. If a publication of this type does not meet the requirements of libel, it is because society has recognized that such publications should not be actionable. If a publication is libelous, a plaintiff may recover for emotional distress. Gertz v. Robert Welch, Inc., supra, 418 U.S. at 350; Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632, 639 (1981). In no event should the plaintiff be permitted to circumvent the restrictions imposed by the law of libel and the First Amendment by repleading his case under another name. See Flynn v. Higham, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (1983).

Finally, plaintiff's claim was fatally defective because there was no evidence that he suffered severe emotional distress. The applicable tort law requires no less. More important, our profound national commitment to freedom of expression requires that public figures toughen their hides in

order to be "able to thrive in a hardy climate." New York Times Co. v. Sullivan, 376 U.S. at 273.

ARGUMENT

I

FIRST AMENDMENT DEFENSES APPLICABLE TO LIBEL APPLY TO CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON PUBLICATION OF ALLEGED INJURIOUS FALSEHOODS

Although the Court of Appeals recognized that the First Amendment must be considered in ruling upon Falwell's claim of intentional infliction of emotional distress, the Court found that First Amendment standards were satisfied by application of the tort's common law requirement of intentional conduct. The Court therefore rejected the defense that the parody was published without actual malice as defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), i.e., without "knowledge of falsity or reckless disregard of the truth," as well as the defense that the parody consisted of protected opinion and rhetorical hyperbole. 797 F.2d at 1273-76.

The Court of Appeals thus departed from the clear teachings of this Court that First Amendment protection does not depend upon the label which state law chooses to affix to a claim. Thus, in New York Times Co. v. Sullivan, the Court stated:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

376 U.S. at 269 (citation omitted). See also N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963). Thus, the protection of the First Amendment extends to any theories of liability which might result in the repression of free speech. As the Court commented in Sullivan, the First Amendment represents

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. at 270. To permit a tort plaintiff to inhibit such speech is impermissible whether the plaintiff pleads libel, intentional infliction of emotional distress, or any other theory of liability.

In keeping with this principle, the California Supreme Court recently observed that "Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated 'defamation,' they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than 'defamation' to their injurious-falsehood claim--a task that appears easy to accomplish as a general matter--and thereby avoid the operation of the limitations and frustrate their underlying purpose." Blatty v. New York Times Co., 42 Cal.3d 1033, 1044-1045, 728 P.2d 1177, 232 Cal.Rptr. 542 (1986)(parenthetical matter deleted). Falwell has accomplished exactly that which Blatty warned against: in addition to

asserting his flawed libel claim, he also claimed intentional infliction of emotional distress based upon the same alleged injurious falsehood in an attempt to avoid the First Amendment and common law defenses applicable to his libel claim.

As also noted in Blatty, the concern over such alternative pleading is not mere unsupported speculation. In recent years it has become common practice for plaintiffs in libel suits to plead alternative theories of relief such as intentional infliction of emotional distress, as defendants can attest from their own experience. See id. at 1045; Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution, 23 Washburn L.J. 24 (1983).

Nor is the concern over such "end runs" around constitutional protections for libel confined to defendants such as Hustler Magazine. As Judge Wilkinson pointed out below, permitting claims of intentional infliction of emotional distress to go forward in cases such as this threaten "the long tradition of satiric commentary" in political debate. 805 F.2d at 484. Political cartoonists and satirists in particular would be threatened by such a development.

As columnist Ellen Goodman observed, "If this decision stands ..., any satirist or would-be humorist had better watch out for nastiness. Good-bye Saturday Night Live. Hello, pabulum." Ellen Goodman, Flynt Was Wronged, Washington Post, Dec. 15, 1984, at 23. The Los Angeles Daily News noted that under the Fourth Circuit's rule, it would not be inconceivable that Vice President Bush could put Doonesbury's Garry Trudeau out of business inasmuch as he has claimed that reading attacks

on himself in the comic strip makes him a "basket case for the rest of the day". Editorial, Flynt, Falwell and Free Speech, Los Angeles Daily News, Dec. 14, 1984.

In New York Times v. Sullivan, supra, the Court extensively discussed the Alien and Sedition Acts, noting their unconstitutionality and observing that what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. 376 U.S. at 276-77. Yet the result below is to permit civil liability to attach in a similar situation. It is noteworthy that one of the victims of prosecution under these acts, Luther Baldwin, was prosecuted simply for expressing an off-color, critical but humorous remark about President Adams.[27] As the Jeffersonian Republican press ironically commented in coming to Baldwin's defense, his prosecution proved "that joking may be very dangerous even to a free country." J. Smith, Freedom's Fetters 274 (1956)(quoting Argus, Nov. 15, 1799).

Neither the form in which views are expressed--whether a speech, a cartoon, an editorial, a parody or other work of

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27. A twentieth century counterpart to Luther Baldwin was vindicated by this Court in Watts v United States, 394 U.S. 705 (1969). Watts had been prosecuted pursuant to 18 U.S.C. sec. 871(a) (prohibiting threats on the life of the President) for saying "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Id. at 706. The Court reversed his conviction, characterizing his statement as "political hyperbole," and observed that language in the political arena is often vituperative and abusive. The Court concluded that Watts' "only offense here was 'a kind of very crude offensive method of stating a political opposition to the President." Id. at 708. See also N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 928 n.1 (1982).

fiction--nor the good or bad taste of the creator may serve to diminish the First Amendment protection to which a publication is entitled. "The line between the informing and the entertaining is too elusive for protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510 (1948).

To the best of our knowledge, the only two reported opinions that have considered the ruling below have firmly rejected it. In Blatty v. New York Times Co., supra, 42 Cal.3d 1033, 1047-48 (1986), the California Supreme Court stated:

> Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the teaching of New York Times. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity (376 U.S. at pp. 279-280)--even though state law did not require him to do so (id. at p. 262). Indeed, in that case the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell Court misses this crucial point and as a result cannot be followed.

See also Ault v. Hustler Magazine, Inc., 13 Med.L.Rptr. (BNA) 1657, 1662 (D.Ore. Oct 20, 1986).

Moreover, as noted above, Judge Wilkinson's dissent (805 F.2d 484) eloquently expresses the dangers of permitting recovery for emotional distress in the absence of libel. See also Note, First Amendment Limitations on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 Columbia L.Rev. 1749 (1985).

A. First Amendment Protections for Opinion and Rhetorical Hyperbole Preclude a Public Figure's Claim of Intentional Infliction of Emotional Distress Based Upon Alleged Injurious Falsehoods in a Parody Which a Jury Has Found Could Not Reasonably Be Understood as Making Any Statements of Fact

1. The First Amendment Immunizes Opinion and Rhetorical Hyperbole from Liability in a Case Such as This

This Court has long recognized that opinion and rhetorical hyperbole constitute protected speech under the First Amendment and cannot give rise to civil liability. In Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970), the Court reversed a libel judgment on the ground that a newspaper's use of the term "blackmail" to describe a public figure's negotiating position was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." Id. at 14. This conclusion was based on the fact that no reader could have thought that the plaintiff was actually being charged with the crime of blackmail. Id.

This Court again recognized the First Amendment protection for rhetorical hyperbole in Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974). Letter Carriers was an action under the Virginia "insulting words" statute, based upon the defendant labor union's characterization in a newsletter of a non-union employee as a "scab" and defining a scab as a "traitor" having "rotten principles" and lacking character. Id. at 267, 283. The Court held that such use of epithets "cannot be construed as representations of fact," id. at 284, but was merely "rhetorical hyperbole, a lusty and imaginative expression of

the contempt felt by union members towards those who refuse to join." Id. at 286. The words in question were not actionable because it was impossible to believe that any reader of the newsletter "would have understood the newsletter to be charging the appellees with committing the criminal offense of treason." Id. at 285. The Court suggested that the only circumstances in which such words might be actionable would be in circumstances in which they conveyed a false representation of fact. Id. No such circumstances are present in this case, as the jury has already found in its unchallenged libel verdict.

By permitting Falwell to recover damages for emotional distress based upon similar rhetorical hyperbole and lusty, imaginative expressions, the Court of Appeals implicitly rejected the teachings of Greenbelt and Letter Carriers. This Court did not limit the First Amendment defense of opinion and rhetorical hyperbole to libel claims. As noted above, the First Amendment applies to all claims based upon exercise of freedom of expression. The First Amendment protections for opinion and rhetorical hyperbole must apply to all attempts to impose civil or criminal liability upon speech which falls within that category. See, e.g., Watts v. United States, 394 U.S. 705 (1969) (rhetorical hyperbole is protected from prosecution under statute forbidding threats on President's life).

Defendants submit that the proper approach to the rhetorical hyperbole defense in a case involving claims of intentional infliction of emotional distress is that of the Tenth Circuit in Pring v. Penthouse International, Ltd., 695

F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983), another case involving a fictitious work. In Pring, as here, the plaintiff alleged libel, invasion of privacy, and intentional infliction of emotional distress. In both cases, the plaintiff was identifiable as the subject of a fictional account. In Pring, the court enunciated the test applied by the jury in this case on the libel claim:

> whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.

Id. at 442. The Court held that this test was mandated by the First Amendment protections accorded to opinion or "rhetorical hyperbole," citing Greenbelt and Letter Carriers. See also Ollman v. Evans, 750 F.2d 970, 984 (D.C.Cir. 1984)(en banc), cert. denied, 471 U.S. 1127 (1985); Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986); Myers v. Boston Magazine, Inc., 380 Mass. 336, 403 N.E.2d 376 (1980).

In fact, the Pring test was also incorporated into the jury instructions given by the court below on Falwell's libel claim. The jury, applying that test, found that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. [Pet. App. C at C1.]

The Tenth Circuit also held that "the same First Amendment considerations must be applied" to Pring's claim of intentional infliction of emotional distress (called "outrageous conduct" in Wyoming), and therefore refused to entertain her appeal from the dismissal of that claim for the same reason that it

reversed her libel judgment. Pring, 695 F.2d at 442. In short, the test requiring that the publication be reasonably understood as describing actual facts about the plaintiff or actual events in which he participated applies, as a matter of constitutional law, to emotional distress claims as well. Accord: Polygram Records, Inc. v. Superior Court, 170 Cal.App.3d 543, 557, 558, 216 Cal.Rptr. 252 (1985).

Pring was simply an unremarkable application of this Court's rulings on rhetorical hyperbole. As noted above, in both Letter Carriers v. Austin, supra, 418 U.S. 264, and Greenbelt, supra, 398 U.S. 6, the Court concluded that the language in question was non-actionable rhetorical hyperbole because it was impossible to believe that any readers would have understood the publication to be charging the plaintiffs with the crimes in question.

The Fourth Circuit itself recognized, several years ago, the importance of the rhetorical hyperbole defense. In Time, Inc. v. Johnston, 448 F.2d 378, 384 (4th Cir. 1971) it observed that "To deny the press the right to use hyperbole, under the threat of removing the protecting mantle of New York Times, would condemn the press to an arid, desiccated recital of bare facts." Similarly, a leading commentator has noted that "if someone wishes to convey the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images." R. Sack, Libel, Slander and Related Problems 246 (1980).

It is, of course, common practice in expressing opinions about public officials and public figures to resort to satire, parody and other imaginative literary devices.[28] The courts have had little difficulty in protecting such expression as opinion and rhetorical hyperbole, notwithstanding the fact that a literal interpretation of the hyperbolic speech might be defamatory and insulting. See, e.g., Yorty v. Chandler, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970) (cartoon depicting mayor of Los Angeles at a telephone with men dressed as hospital orderlies and carrying a straitjacket beckoning to him; caption showed mayor saying: "I've got to go now ... I've been appointed Secretary of Defense and the Secret Service men are here!"); Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376 (1980) (article on "Best & Worst: Sports" which stated that plaintiff sportcaster was "enrolled in a course for remedial speaking;" although article was "rough" and "generally preposterous," statement was hyperbolic and readers would not reasonably understand statement to be an assertion of fact).

In the case at bar, the majority stated, "We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress." 797 F.2d at 1276. The Court therefore concluded that outrageous opinion is not entitled to First Amendment protection, despite this Court's numerous holdings to

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28. Publications such as editorial cartoons, which are similar in nature to the ad parody here in question, have been held to be protected as rhetorical hyperbole. See Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985).

the contrary. In words quoted in virtually every libel case since 1974, this Court pronounced in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. [Emphasis added.]

By simply accepting the notion of "outrageousness"--an element of the tort of intentional infliction of emotional distress--as sufficient to allay fears that the expression of opinion might be actionable, the Court of Appeals ignored the clear teaching of this Court that it is not a proper role for a jury to determine whether an opinion is outrageous. In fact, to invite a jury to pass judgment on opinion based upon the juror's own concepts of what is or is not outrageous (an unacceptably vague standard even if it were otherwise acceptable; see D. Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L.Rev. 42, 51 (1982); R. Bernstein, Note: First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 Colum. L.Rev. 1749, 1774 (1985)) is to eviscerate the opinion defense and its underlying premise that our society encourages its members to speak their minds and leaves it to the marketplace of ideas to determine what opinions are or are not acceptable.

Permitting liability based "outrageous" opinion is especially inappropriate in case of satire and parody. "Since parody seeks to ridicule sacred verities and prevailing mores,

it inevitably offends others, as evinced by the shock which Chaucer's Canterbury Tales and Voltaire's Candide provoked among their contemporaries." L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir. 1987).

In ignoring the opinion defense simply because it found the opinions expressed in the parody to be outrageous, the Court of Appeals wrote the First Amendment out of the tort of intentional infliction of emotional distress.[29] If this ruling is permitted to stand, the defense of opinion or rhetorical hyperbole will be rendered useless and the law of

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29. The Court of Appeals' brief and casual dismissal of the opinion defense may also be read as concluding that this defense need not be reached because defendants were found liable not because of the statements in the ad parody--which are nonactionable opinion and rhetorical hyperbole--but simply because of the publication of the parody, which is conduct and separately actionable. 797 F.2d at 1276. This is similar to the theory adopted by the District Court, which concluded that "liability is predicated not on Hustler's publishing the ad parody, but on Flynt's contributing to the parody and appropriating it for his own malicious purposes." (Pet. App. D. at D8.) The District Court acknowledged that the jury found that the publication of the ad parody was not actionable, but that it was nevertheless the "vehicle by which plaintiff learned of Flynt's outrageous conduct." Id. The problem with either of these similar approaches is that they attempt to separate the content of one's expression from the fact of the expression and purport to punish only the latter. In reality, there is no meaningful distinction between the two. If a statement is not actionable because it is opinion, the simple publication of the statement does not transform it into something actionable. Indeed, a statement is not a statement unless it is communicated, and the First Amendment certainly presumes that the expression which it protects will be spoken (freedom of speech) or published (freedom of the press). Similarly, if the ad parody was simply a "vehicle" by which Falwell learned of "Flynt's outrageous conduct", what outrageous conduct did the District Court have in mind? The only "conduct" in question in this case, and the only conduct complained of in the Complaint (J.A. ___), was the publication of the ad parody.

libel will be rendered obsolete, superseded by the new emotional distress tort which will be free of any constitutional baggage.

2. The Ad Parody Consisted of Rhetorical Hyperbole and Opinion

In the case at bar, the jury's finding on Falwell's libel claim forecloses any question whether the ad parody is rhetorical hyperbole and opinion. The special verdict which the jury returned was tailored to the language of Pring, Greenbelt and Letter Carriers which defined rhetorical hyperbole. In concluding that the ad parody could not reasonably have been understood as describing actual facts about the plaintiff or actual events in which he participated, the jury determined this First Amendment issue in defendants' favor.

Humor such as that contained in the ad parody is a typical form of expression of political opinion. In fact, it has been observed that in politics the use of humor is "indispensable for limiting the war to words." C. Schutz, Political Humor 8 (1977). Thus, far from being an instrument designed to cause severe emotional harm to a political figure, humor is a means by which political combat is restricted. See also id. at 32, 48. The fact that Falwell finds the type of humor in the ad parody offensive does not make it any less an expression of protected opinion. In fact, "'dirty' political jokes ... are necessarily a part of the political culture, and vulgar and blasphemous humor is quintessentially a part of democratic politics." Id. at 10. Moreover, the "most common form" of

political humor is "political invective" which is "often crude and cruel." Id. at 24, 25, 246-7. Sex-related humor is the most popular, continuous and ancient of comic forms. Id. at 32. The familiar tale of the politician who said his rival would die of hanging or a dread disease and received the reply that the outcome would depend upon whether he embraced the speaker's principles or his mistress is a well-known case in point which, under plaintiff's theory, would probably be actionable as intentional infliction of emotional distress.

In words which might have been tailored for the case at bar had they not been written years before, one scholar has observed that

> Political humor, with its comic permissiveness toward taboo violations, can be resorted to as disguised aggression against moral and religious pretensions in politics. Moreover, comic blasphemy often makes the assumed moral superiority of some political pretender the target for ridicule.

Id. at 43-44.

The use of such sharp humor as a means of expressing opinion enjoys a long tradition in American political life. Abraham Lincoln is said to have engaged in "jests so coarse that they could not be put to record." Id. at 184. See also the historical instances enumerated in Desert Sun Publishing Co. v. Superior Court, 97 Cal.App.3d 49, 51-52, 158 Cal.Rptr. 519 (1979).

The First Circuit recently recognized that the First Amendment protects ad parodies, even when they are offensive and offend the subject of the parody. In L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987), the court

reversed a grant of summary judgment to an advertiser which had sued a magazine publisher for publishing a sexually explicit parody of the advertiser's catalog. The court held that the plaintiff's claims of trademark dilution were barred by the First Amendment. The court noted that "parody is often offensive, [but] it is nevertheless 'deserving of substantial freedom--both as entertainment and as a form of social and literary criticism.'" Id. at 33. Citing Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986), the court observed that "destructive" parodies play an important role in social and literary criticism and thus merit protection. Id. The court concluded that a "judicial evaluation of the offensiveness or unwholesomeness of the appellant's materials" was impermissible, citing Cohen v. California, 403 U.S. 15, 25 (1971). Id. at 34. The court concluded:

> Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.

Id.

Thus, humor such as the ad parody is a classic form of expression of opinion, part of a long tradition of political and social discourse.[30] It would violate that tradition as

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30. Early in his career, Benjamin Franklin followed the lead of Jonathan Swift and, in an early edition of Poor Richard's Almanack, reported the imminent death of a rival publisher. When his competitor protested that he was not dead, Poor Richard responded that he was indeed "really defunct and dead." W. Blair, Horse Sense in American Humor 17-18 (1942). Such conduct would appear to qualify as intentional infliction of emotional distress under the standards enunciated by the Court of Appeals.

well as the First Amendment values which are inextricably intertwined with that tradition to permit political figures to recover for alleged emotional distress suffered as a result of such satirical comment.

B. The First Amendment Requirement of "Actual Malice" Precludes a Public Figure's Claim of Intentional Infliction of Emotional Distress Based Upon Alleged Injurious Falsehoods in a Parody Unless He Proves with Convincing Clarity that the Parody Was Published with Knowing or Reckless Falsity

1. New York Times v. Sullivan "Actual Malice" is Not Satisfied by Intent to Harm, but Requires Knowing or Reckless Falsity

This Court has held that the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to harm by publishing a falsehood about the public figure. In Garrison v. State of Louisiana, 379 U.S. 64 (1964), the Court stated:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure * * * it may be almost impossible to show freedom from ill-will or selfish political motives." Id., at 893, n. 90.

379 U.S. at 73-74 (emphasis added; ellipsis and brackets in original). Thus, the Court recognized that the interest in fostering the robust expression of opinion which is at the cornerstone of our society bars the states from imposing

liability for critical comments about public figures unless such comments are made with an intent to communicate false assertions of fact.

In the case at bar, the Court of Appeals reasoned that although the First Amendment requires a finding of "actual malice" in order for a public figure to prevail on a claim of intentional infliction of emotional distress, the knowing or reckless falsity standard was inapplicable because falsity is not an element of that tort. 797 F.2d at 1275. Thus, the Court of Appeals concluded that First Amendment considerations would be satisfied if the defendant's intentional or reckless conduct has proximately caused emotional distress. Id.

This totally ignores the teachings of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny. Sullivan held that speech about a public official may not be subject to liability unless there is clear and convincing evidence that it was made with "actual malice," i.e. knowledge of its falsity or reckless disregard for the truth.[31] This was extended to public figures--a class into which Falwell undeniably falls--in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

As the California Supreme Court observed in Blatty v. New York Times Co., supra, 42 Cal.3d at 1047-1048, the Fourth Circuit's interpretation of the New York Times actual malice

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31. The case at bar demonstrates the difficulties and pitfalls inherent in the use of the term "actual malice" to describe a state of mind which really has nothing to do with "malice" in the sense that ordinary jurors (or, for that matter, most lawyers) understand the term. See Westmoreland v. CBS, Inc., 596 F.Supp. 1170, 1172 n.1 (S.D.N.Y. 1984).

standard as simply increasing the level of fault misunderstands the nature and purpose of the actual malice rule. In Blatty, the Court noted that New York Times v. Sullivan required a plaintiff to establish falsity even though state law did not necessarily require him to do so, thereby adding the element of falsity to the tort and altering its nature. In Garrison v. State of Louisiana, 379 U.S. 64 (1964), the Court similarly altered the nature of criminal libel, imposing a requirement of falsity although "at common law, truth was no defense to criminal libel." Id. at 67-68. The Court observed that

> Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace. Id.

Such an offense, to which truth or falsity was irrelevant, seems much closer to the tort of intentional infliction of emotional distress than to post-New York Times v. Sullivan libel. Yet this Court imposed the "knowing or reckless falsity" requirement on civil and criminal libel even though there was nothing in the common law which proscribed the state from creating liability even in the absence of falsity. The same constitutional concerns apply when the plaintiff simply relabels his claim as one for intentional infliction of emotional distress.

The Court of Appeals thus erred in concluding that the explanation for the "knowing or reckless falsity" requirement of New York Times v. Sullivan lies in this Court's desire to "increase the level of fault necessary for a public figure to

prevail," apparently without regard for the nature of the fault. See 797 F.2d at 1275.

Rather, the reason for the imposition of the "knowing or reckless falsity" standard lay in this Court's recognition that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," New York Times v. Sullivan, 376 U.S. at 269, that free political discussion is maintained "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means," id., that it "is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," id., that this opportunity is afforded for both "vigorous advocacy" and "abstract discussion," id., that constitutional protection should not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered," id. at 271, that "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press," id. (quoting Madison in the debates on the federal Constitution), that "erroneous statement ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive,'" id. at 271-272, and that our society has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270.

These principles would be meaningless if they could be circumscribed by a public official or public figure who claims, not that his reputation has been harmed, but that he has suffered emotionally due to such "vehement, caustic, and ... unpleasantly sharp attacks." This court did not elaborate at length on the fundamental reasons of constitutional policy for requiring proof of knowing or reckless falsity simply because it was adjudicating a libel case rather than an emotional distress case. The law which this Court was applying was not simply the law of libel, but rather the constitutional law of freedom of speech and of the press, which does not depend upon the label which a plaintiff attaches to his claim. See N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963).

In cases such as New York Times v. Sullivan and Garrison v. Louisiana, supra, 379 U.S. 64, the Court recognized that it is a common and even necessary fact of our national political and social life that people will speak out of anger, hatred and ill will when discussing public issues and public figures.[32] Figures such as Jerry Falwell invite heated discussion by entering the public arena and taking controversial stands on issues of the day. One cannot become a public figure only for the purpose of receiving praise from his fellow man; one must also expect to incur the ill will of those who disagree with

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32. Madison recognized this long ago in the Report on the Virginia Resolutions, stating, "[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; ...." See New York Times Co. v. Sullivan, 376 U.S. at 275 n.15.

one's positions. As long as the expression of such ill will is confined to the exercise of freedom of speech and the press, it cannot be constrained.

The Court of Appeals has converted the inquiry about defendants' subjective awareness of falsity into a simple inquiry into malice and intent to harm. See 797 F.2d at 1275. As noted above, this Court has repeatedly rejected such a standard. See, e.g., Garrison v. Louisiana, discussed supra. In Letter Carriers v. Austin, supra, 418 U.S. 264, the court reversed a libel judgment for plaintiffs where the trial court had instructed the jury that the defendants were liable if they published with "actual malice," incorrectly defined as "some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff." In Letter Carriers, there was little doubt that the defendants had acted with such malice, and the jury so found. However, this Court held that such a finding was constitutionally insufficient. "[I]ll will toward the plaintiff, or bad motives, are not elements of the New York Times standard." Id. at 281, citing the following cases which also held that instructions permitting a finding of liability based upon spite, ill will or desire to injure are constitutionally impermissible: Garrison v. Louisiana, supra; Henry v. Collins, 380 U.S. 356 (1965); Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 9-11 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971); and Rosenblatt v. Baer, 383 U.S. 75, 84 (1966).

2. The New York Times v. Sullivan Knowing or Reckless Falsity Standard Applies to All Claims of Injurious Falsehood Regardless of the Cause of Action

The reasons set forth above for requiring a public figure to prove knowing or reckless falsity when he claims damage to to an injurious falsehood apply regardless of the cause of action the public figure chooses to plead. Thus, the New York Times v. Sullivan actual malice requirement is not confined to libel suits, but to any suits attempting to impose civil liability upon critical commentary about public figures. Accordingly, this Court held that knowing or reckless falsehood must be proved in invasion of privacy cases. Time, Inc. v. Hill, 385 U.S. 374 (1967).

Invasion of privacy, like intentional infliction of emotional distress, is concerned with mental distress rather than injury to reputation. Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983), citing Time, Inc. v. Hill, supra, 385 U.S. at 384 n.9. Thus, if the Court of Appeals' analysis herein were correct, a public figure plaintiff should be able to recover damages for invasion of privacy simply by proving intentional conduct by the defendants, without having to prove knowing or reckless falsity.

The logic of the cases requiring a showing of knowing or reckless falsity in invasion of privacy cases requires a similar showing in cases involving intentional infliction of emotional distress. The decision below conflicts with this constitutional principle. Moreover, it is in direct conflict with holdings of other courts.

In Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978), rev'd on other grounds, 443 U.S. 111 (1979), the Seventh Circuit denied relief on a count for intentional infliction of emotional distress, among others, because the court had already concluded that there was no cognizable defamation claim due to a lack of New York Times v. Sullivan actual malice. The court concluded, "We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused." 579 F.2d at 1036. The court rejected the notion that "'malice' or other improper intent" was a sufficient basis for liability: "Where the constitutional right to free speech is involved, as it is here, the New York Times standard would be applicable to such an intent inquiry." Id. at 1036 n.16.

The California Supreme Court came to a similar conclusion in Reader's Digest Ass'n v. Superior Court, 37 Cal.3d 244, 690 P.2d 610, 208 Cal.Rptr. 137 (1984), cert. denied, ___ U.S. ___, 106 S.Ct. 3307 (1986). After holding that a libel claim must fail because the alleged libel was not published with knowing or reckless falsity, the Court addressed the claims of intentional infliction of emotional distress and invasion of privacy:

> Each of these additional causes of action are based upon the same facts as the cause of action for libel. Our conclusion that the plaintiffs have failed to show a triable issue of fact as to actual malice requires summary judgment on every claim based upon the publication of the Reader's Digest article.

> The New York Times decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given to the stated cause of action (see New York Times Co. v. Sullivan, supra, 376 U.S. 254, 269; it bars not only actions for defamation, but also claims for invasion of privacy (Time, Inc. v. Hill (1967) 385 U.S. 374, 387-388; Goldman v. Time, Inc. (N.D.Cal. 1971) 336 F.Supp. 133, 137-138; Kapellas v. Kofman (1969) 1 Cal.3d 20,. 35 fn. 16). Dederich's cause of action for intentional infliction of emotional distress presents an issue of first impression, but fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.

Id. at 265.

This Court has also assumed, without deciding, that the knowing or reckless falsity standard must be met in a product disparagement case. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984). In fact, Letter Carriers v. Austin, supra, 418 U.S. 264, was actually an action brought under an "insulting words" statute forbidding use of words that are construed as insults and tend to violence and breach of the peace.

In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), an invasion of privacy case, the Court noted that the actual malice test in such a case was not satisfied by common law malice, "frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights." Rather, the test even in a privacy case focuses on the defendant's attitude toward the truth or falsity of the material published. 419 U.S. at 252. The same is obviously true when the plaintiff alleges intentional

infliction of emotional distress.

3. Defendants Did Not Publish the Ad Parody with Knowing or Reckless Falsity

Clearly, Petitioners did not publish the ad parody in this case with knowing or reckless falsity. As the jury concluded, the ad parody did not make any false statements of fact about the plaintiff. As the Court stated in Letter Carriers v. Austin, supra, 418 U.S. at 284, "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact." See also Rinaldi v. Holt, Rinehart & Winston, Inc. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977) ("Before knowing falsity or reckless disregard for the truth can be established, the plaintiff must establish that the statement was false.").

Having failed to establish this prerequisite to a finding of actual malice, Falwell has failed to overcome the barrier which the First Amendment imposes on public figures seeking to recover damages for injurious falsehoods.

Even if one were to ignore the fact that the ad parody actually contained no false statements of fact, an examination of defendants' state of mind in light of the New York Times v. Sullivan standard reveals that the parody was not published with the requisite knowing or reckless falsity. As is set forth above (pp. 3-5), defendants did not believe they were publishing false statements of fact; they reasonably believed that the parody would be understood as humor and would not be taken seriously. The jury obviously agreed when it returned its libel verdict.

Under the circumstances, defendants certainly did not publish with knowledge that they were publishing false statements. Nor did they publish with reckless disregard for the truth, which requires a subjective awareness of a high degree of probability that one is publishing falsity and the entertainment of serious doubts about the truth of the publication. St. Amant v.Thompson, 390 U.S. 727, 731 (1968).

When frankly fictitious works such as parodies are involved, such subjective awareness of falsity necessarily requires that the publisher be aware that readers are likely to believe that they are reading factual statements about the plaintiff. Any other interpretation of the New York Times v. Sullivan standard would disable comedians, editorial cartoonists, or novelists from depicting public figures in any situation that was not literally true, even though the audience is aware that the joke, cartoon or fiction is not intended to represent literal reality.

Courts which have been confronted with such situations have recognized that the New York Times v. Sullivan standard requires an inquiry into what the author believed his publication would be interpreted as saying. See Tilton v. Cowles Publishing Co., 76 Wash.2d 707, 725, 459 P.2d 8 (1969) ("in order to find actual malice, ... plaintiffs must prove with convincing clarity that defendant was aware of a high probability that the public would read the article as reporting a criminal charge, or at least that the defendant entertained serious doubts on this matter."); Woods v. Evansville Press Co., 791 F.2d 480, 487 (7th Cir. 1986) (although article was

capable of supporting false and defamatory implications, plaintiff failed to prove actual malice because there was no evidence that defendants interpreted the article they published in that manner; publisher must intend the defamatory implication); Miss America Pageant, Inc. v. Penthouse International, Ltd., 524 F.Supp. 1280, 1286-7 (D.N.J. 1981) (summary judgment for defendants based on same facts as in Pring v. Penthouse, supra, because defendants believed they were publishing a fictitious work and had neither subjective awareness that they were publishing a falsity nor intent to publish falsely); Fong v. Merena, 66 Haw. 72, 655 P.2d 875 (1982) (although defendant's sign could be construed in false and defamatory manner, there was not clear and convincing evidence that defendant construed it in that manner); Polakoff v. Harcourt Brace Jovanovich, Inc., 3 Med.L.Rptr. 2516, 2517 (N.Y.Sup.Ct. 1978), aff'd, 67 A.D.2d 871, 413 N.Y.S.2d 537, appeal dismissed, 48 N.Y.2d 714, 397 N.E.2d 1182 (1979) (reader must conclude "that the author intended the reader to believe that Moses Polakoff participated in procuring an assassin as described in the book").

See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512-513 (1984), where the Court concluded that there was insufficient evidence of knowing or reckless falsity when the author of the disparaging article chose words which inaccurately and disparagingly described the plaintiff's product, but did not realize that his words would be so understood.

The appropriate inquiry thus is not whether defendants knew that the statements ascribed to Falwell in the ad parody were objectively false. Rather,

> Under New York Times and Gertz, the focus should be on subjective awareness of the defendant with respect to the manner in which he believes his humorous communication will be understood. If he thinks he is conveying an idea or a joke, he should be protected; if he knows or believes he will be understood to be conveying a statement of fact that he knows or believes is false, he should not be protected.

Sack, Libel, Slander and Related Problems 241 (1980).

In Good Government Group of Seal Beach, Inc. v. Superior Court, 22 Cal.3d 672, 684, 150 Cal.Rptr. 258, 586 P.2d 572 (1978), cert. denied, 441 U.S. 961 (1979), the court expressed the same thought in another way, concluding that

> It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in New York Times, and that a statement is entitled to constitutional protection if the words used are ambiguous but the defendant honestly and without recklessness believes that they constitute an opinion or idea. [Emphasis added.]

In the case at bar, it is clear that defendants did honestly believe that they were expressing opinions and ideas rather than statements of fact. The jury came to the same conclusion. Falwell thus did not surmount the constitutional barrier of actual malice, as properly defined. The Court of Appeals' test, based solely upon intent to harm, is constitutionally inadequate.

4. An Independent Review of the Evidence Would Establish the Lack of Clear and Convincing Evidence of Malice

Even if the Court of Appeals were correct in concluding that for purposes of the emotional distress tort the First

Amendment requires nothing more than a showing of intentional conduct, the Court of Appeals did not pursue its constitutional mandate to conduct an independent review of the evidence and to find such malice by clear and convincing evidence.

In concluding that actual malice was present in this case, the Court of Appeals simply deferred to the jury's finding that defendants had engaged in willful conduct. 797 F.2d at 1275-1277. However, this Court has held that in reviewing First Amendment defenses, appellate courts must engage in an independent, de novo review of questions of "constitutional fact." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984). In Bose, the Court observed that such independent review is required in all varieties of cases involving First Amendment defenses, including but not limited to libel. Thus, the Court of Appeals improperly avoided its obligation to conduct such an independent review when it deferred to the jury's finding.

Moreover, the jury's finding of malice, which the Court of Appeals concluded satisfied the constitutional standard, was made as part of its review of the elements of the tort of intentional infliction of emotional distress. The jury therefore decided this issue by a preponderance of evidence. Actual malice, on the other hand, must be proven by clear and convincing evidence. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Defendants submit that an independent review of the evidence herein can only lead to the conclusion that there was not clear and convincing evidence that the ad parody was published with actual malice, even when such malice is

redefined as the Court of Appeals defined it. As is set forth in the Statement of the Case (pp. 4-5, supra), the evidence shows that defendants' only intent in publishing the ad parody was to make a humorous social and political comment, not to harm Falwell.

C. A Public Figure May Not Recover Damages for Injured Feelings Caused by Allegedly Injurious Falsehoods in a Parody When the Parody Caused No Harm to his Reputation

The First Amendment defenses addressed above mandate reversal in this case not simply because of a mechanical application of the rhetorical hyperbole and knowing or reckless falsity defenses, but because the policies which have led the Court to adopt these defenses would be offended and endangered if a public figure could recover for emotional distress based upon expression such as the ad parody.

A number of courts have held that the tort of intentional infliction of emotional distress may not be utilized to recover damages when the gravamen of the complaint is really that of libel. See Flynn v. Higham, supra, 149 Cal.App.3d 677; Todd v. South Carolina Farm Bureau Mutual Insurance Company, 283 S.C. 155, 321 S.E.2d 602 (1984), quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985); Ault v. Hustler Magazine, Inc., supra, 13 Med.L.Rptr. (BNA) 1657. One of the most recent jurisdictions to recognize this was New York, whose highest court stated, "It would be improper to permit plaintiff to evade the specific prerequisites for a libel action by presenting his cause of action in terms of the generalized tort of intentional infliction of emotional distress." Wilson v.

Merrill Lynch, Pierce, Fenner & Smith, Inc., 66 N.Y.2d 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297 (1985). See also Fischer v. Maloney, 43 N.Y.2d 553, 558, 373 N.E.2d 1215, 402 N.Y.S.2d 991, 993 (1978).

A California appellate court elaborated on the same theme in Flynn v. Higham, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (1983), when it held that a claim of intentional infliction of emotional distress cannot be maintained based upon the same acts which were insufficient to support a cause of action for defamation. The court reasoned:

> It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort. To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step toward "swallowing up and engulfing the whole law of public defamation."

149 Cal.App.3d at 681. The quotation from Dean Prosser was from an article addressing the expansion of the tort of invasion of privacy, but his words apply equally to suits for intentional infliction of emotional distress. Dean Prosser noted that if plaintiffs could plead invasion of privacy whenever they have been libelled, "it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?" W. Prosser,

Privacy, 48 Cal.L.Rev. 383, 401 (1960).

Recognizing the dangers warned of by Dean Prosser, the Flynn court concluded:

> to allow an independent cause of action for the intentional infliction of emotional distress, based upon the same acts which would not support a defamation action, would allow plaintiffs to do indirectly that which they could not do directly. It would also render meaningless any defense of truth or privilege.

149 Cal.App.3d at 682. The court therefore rejected an emotional distress claim appended to a defective libel claim.

The law of libel already provides a remedy for public figures who suffer emotional distress as a result of injurious falsehood. Damages may be awarded for such distress if the plaintiff is able to prove that he was libelled. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632, 639 (1981). There is therefore no justification for expanding the tort of intentional infliction of emotional distress to provide an additional means to recover such damages, especially when it permits the plaintiff to avoid the carefully constructed requirements of the law of libel.

Defendants submit that the Court of Appeals incorrectly concluded that Virginia would recognize the tort of intentional infliction of emotional distress arising out of the same facts as a defective libel claim. Moreover, we submit that the First Amendment forbids the use of the tort of intentional infliction of emotional distress as a substitute for libel, especially when the claim is brought by a public figure or public official. Perhaps President Truman expressed the thought most aptly when he stated, "If you can't stand the heat, get out of

the kitchen." Personages such as Jerry Falwell who voluntarily choose to place themselves before the public as paragons of virtue and who enjoy immense power in the political life of the nation must be expected to endure the rough and tumble life of political debate. Unless subjected to false statements of fact, in which there is no constitutional value, they should be expected to have toughened their hides to withstand the insult and invective that often accompanies heated comment on the issues of the day. "[V]ehement, caustic, and sometimes unpleasantly sharp attacks" often seem necessarily to accompany our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." See New York Times Co. v. Sullivan, supra, 376 U.S. at 270. The First Amendment does not ask too much of public officials and public figures such as Respondent if it requires them to limit their remedies for harsh words to situations in which they are the subjects of defamatory falsehoods. Rather, it is to be expected that such public figures will be "men of fortitude, able to thrive in a hardy climate." See id. at 273.

Indeed, even in the absence of First Amendment considerations the tort of intentional infliction of emotional distress requires a high threshold before a plaintiff can recover. As comment d to Section 46 of the Restatement (Second) of the Law of Torts (governing intentional infliction of emotional distress) notes, "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required

to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."

II

A PUBLIC FIGURE MAY NOT PREVAIL ON A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON ALLEGED INJURIOUS FALSEHOODS IN A PARODY UNLESS HE PROVES THAT HE SUFFERED SEVERE EMOTIONAL DISTRESS

As noted in the Statement (supra at 6-7), Falwell's evidence of emotional distress was limited to his own testimony that he was angry and "felt like weeping" and the testimony of a close colleague that his enthusiasm and optimism were somewhat diminished in subtle ways. Such damages are insufficient to justify the recovery of substantial compensatory and punitive damages based upon critical commentary about a public figure. Neither the common law of Virginia nor the First Amendment permits such an award.

Comment (j) to Section 46 of the Restatement (Second) of Torts (governing the tort of intentional infliction of emotional distress) states the degree of emotional distress which must have been suffered in order to recover:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity.

[Emphasis added.] Indeed, comment (k) notes that "normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm which in itself affords evidence that the distress is genuine and severe."

Virginia courts have followed the Restatement and have adopted the requirement that in order to recover for intentional infliction of emotional distress, the distress must be "severe." See Naccash v. Burger, 223 Va. 406, 416, 290 S.E.2d 825 (1982).

The evidence of plaintiff's emotional distress in the case at bar was utterly insufficient to cross this threshold. To permit Falwell to recover substantial damages based upon such a showing is to invite all public figures and public officials to fabricate vague claims of emotional upset in order to recover for unkind language which would not qualify as libelous.

Defendants provided both courts below with citations to a large number of reported cases in which claims were dismissed due to inadequately severe emotional distress on showings of distress far more severe than that which Falwell proved. See, e.g., Moolenaar v. Atlas Motor Inns, Inc., 616 F.2d 87, 89 (3d Cir. 1980); Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983). See also Nekolny v. Painter, 653 F.2d 1164, 1172 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). In contrast, plaintiff could not cite a single case in which a showing as vague and sketchy as his showing in this case had been upheld as being sufficiently severe to meet the requirements of the tort.

Not only do the common law requirements of the tort require a showing of severe emotional distress, but the First Amendment also requires such proof. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-350 (1974) (First Amendment requires plaintiff in libel suit to prove actual injury by competent evidence); cf. Carey v. Piphus, 435 U.S. 247, 260-264 (1978). As noted above, public officials and public figures must be expected to endure a certain degree of caustic criticism. Mere hurt feelings are constitutionally insufficient to justify the imposition of substantial damages upon one who chooses to speak his mind, however unkindly, about a public personage.

CONCLUSION

If the opinion below is permitted to stand, the law of libel and the First Amendment protections which have grown up around it will be fatally undermined. Defamation law will fall into disuse because it will be so much easier for a public figure to prove intentional infliction of emotional distress without having to prove that the defendant made a false statement of fact, or that the defendant spoke or published with knowing or reckless falsity.

It is not only the Hustler magazines of this world which will be threatened if Respondent is allowed to prevail. As Judge Wilkinson noted, "To permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law of defamation since New York Times v. Sullivan." 805 F.2d at 484. If the Court of Appeals' holding remains the law, nobody will dare to speak with ill will toward

a public figure. The self-censorship which the New York Times v. Sullivan actual malice rule was intended to prevent will stay the pen of every editorial cartoonist and columnist who considers writing about a public figure whom he or she dislikes. The decision below is a dangerous one in a society which values wide-open debate.

The decision of the Court of Appeals is bound to have a chilling effect upon the free exercise of First Amendment rights unless this Court reverses the decision of the Court of Appeals and orders that judgment be entered for the defendants.

Respectfully submitted,

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June 15, 1987

PETITIONER'S

BRIEF

Supreme Court, U.S.
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CLERK

No. 86-1278

In The
Supreme Court of the United States
October Term, 1986

HUSTLER MAGAZINE, INC. AND
LARRY C. FLYNT,

Petitioners,

v.

JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment defenses applicable to libel are applicable to claims of intentional infliction of emotional distress based upon publication of alleged injurious falsehoods.

A. Whether First Amendment protections for opinion and rhetorical hyperbole preclude a public figure prominent in the nation's political life from recovering on a claim of intentional infliction of emotional distress due to alleged injurious falsehoods in a parody which a jury has found could not reasonably be understood as making any statements of fact about the public figure.

B. Whether the First Amendment requirement of "actual malice" precludes a public figure prominent in the nation's political life from recovering on a claim of intentional infliction of emotional distress due to alleged injurious falsehoods in a parody unless he proves by clear and convincing evidence that the parody was published with knowing or reckless falsity.

C. Whether a public figure prominent in the nation's political life may recover substantial compensatory and punitive damages because he suffered some hurt feelings due to alleged injurious falsehoods in a parody when the parody caused no harm to his reputation.

2. Whether a public figure plaintiff prominent in the nation's political life may prevail on a claim of intentional infliction of emotional distress based upon alleged injurious falsehoods in a parody when the only proof of emotional distress consists of evidence that the plaintiff

was angered and that his optimism and enthusiasm were somewhat diminished.

A. Whether the Court below correctly found that such evidence was sufficient to meet the requirement of the tort that the plaintiff's emotional distress be severe.

B. Whether the First Amendment permits an award of substantial compensatory and punitive damages based upon such a showing.

THE PARTIES

Petitioners (defendants below) are Hustler Magazine, Inc. and Larry Flynt, the corporate and individual publishers, respectively, of *Hustler* Magazine. Hustler Magazine, Inc., a California corporation, is a corporation sharing common ownership with L.F.P., Inc., a California corporation. Respondent (plaintiff below) is Jerry Falwell.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix A to Petition for Writ of Certiorari—hereinafter "Pet. App. A.") is reported at 797 F.2d 1270 (4th Cir. 1986). The order denying rehearing *en banc*, together with the dissenting opinions of five of the eleven judges of the United States Court of Appeals for the Fourth Circuit (Pet. App. B), is reported at 805 F.2d 484 (4th Cir. 1986). The opinion of the United States District Court for the Western District of Virginia (Pet. App. D), which denied a motion for judgment notwithstanding the verdict, is not reported.

JURISDICTION

The opinion of the Court of Appeals was dated August 5, 1986. The Court denied petitioners' petition for rehearing *en banc* on November 4, 1986. The petition for a writ of certiorari was filed on February 2, 1987 and was granted on March 30, 1987. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

This lawsuit was filed by one of the nation's most prominent public and political figures, Jerry Falwell, based upon the publication in *Hustler* Magazine of a parody featuring his name and likeness. The Complaint, as originally filed in the United States District Court for the Western District of Virginia, alleged libel, invasion of privacy, and intentional infliction of emotional distress. Jurisdiction was based upon diversity of citizenship.

The ad parody (Pet. App. E) was accurately described by the Court of Appeals in its opinion:

> The "ad parody" which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about their "first time." They mean, their first encounter with Campari Liqueur, but there is double entendre with a sexual connotation. In the *Hustler* parody, Falwell is the celebrity in the advertisement. It contains his photograph and the text of an interview which is attributed to him. In this interview Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and Falwell appears as a hypocrite and habitual drunkard. At the bottom of the page is a disclaimer which states "ad parody—not to be taken seriously." The parody is listed in the table of contents as "Fiction; Ad and Personality Parody."

797 F.2d at 1272.

Following denial of motions for judgment on the pleadings and summary judgment, the case proceeded to trial before a jury on December 3, 1984. The testimony of

five witnesses involved in the publication of the parody was offered.[1]

The testimony of these witnesses revealed that the original idea for the parody was offered by a free lance writer named Michael Salisbury in response to a request for suggested topics for ad parodies.[2] Aside from the first line, which was suggested by Salisbury, the text of the parody was written by Bruce Helford, an editor of the magazine.[3] Thus, neither the idea of a Campari-Falwell parody nor any of the text of the parody originated with defendant Flynt. The intent was to publish satire and parody. The purpose of the parody was to poke fun at Campari liqueur for its advertising campaign based upon interviews with celebrities about their "first time."[4] The parody was not published out of any personal animosity toward Falwell or with any intent to hurt him.[5] Falwell was used as the celebrity in the parody for humorous effect because it was obvious that he would never actually engage in the activities related in the parody or make the statements attributed to him therein.[6] The disclaimer,

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1. Kelly Garrett and Richard Warren Lewis, editors of the magazine, testified at trial, as did Larry Flynt, editor in chief and publisher of the magazine. Plaintiff also offered deposition testimony of Flynt. Bruce Helford, the author of the parody, and David Kahn, the magazine's general counsel, testified by deposition.
2. Helford testimony, Joint Appendix (hereinafter "J.A.") 165-69, 171; Lewis testimony, J.A. 56; Flynt trial testimony, J.A. 61-63.
3. Helford testimony, J.A. 168-171; Flynt trial testimony, J.A. 62-63.
4. Lewis testimony, J.A. 56-57; Flynt trial testimony, J.A. 63-64.
5. Helford testimony, J.A. 173; Flynt trial testimony, J.A. 69.
6. Flynt trial testimony, J.A. 64-68.

"Ad Parody—Not to Be Taken Seriously," was added to make clear what was already obvious: that it was not a genuine ad or interview with Falwell. In fact, most of the editors thought such a disclaimer to be unnecessary precisely because the item was so obviously a parody.[7] None of the editors believed that any readers would actually take the parody seriously or interpret it to be a true statement of fact or a genuine interview with Falwell.[8] The consensus of all the editors was that the Campari item was obviously a parody.[9] It was believed that it would be understood as humor.[10] The magazine often published ad parodies, including other parodies in the same issue of the magazine in which the Campari parody appeared.[11] The magazine did not normally publish any "national advertising," i.e. actual ads of nationally known products such as Campari, which might lead readers to believe the Campari parody was a genuine ad.[12] Thus, the record demonstrates that defendants' intent in publishing the parody was not to publish any false statements of fact about Falwell or to cause him any harm, but simply to make a humorous social and political comment

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7. Helford testimony, J.A. 172; Garrett testimony, J.A. 87-89; Lewis testimony, J.A. 56-57.
8. Helford testimony, J.A. 172-175; Lewis testimony, J.A. 57-58; Garrett testimony, J.A. 89; Flynt trial testimony, J.A. 68.
9. Garrett testimony, J.A. 88.
10. Garrett testimony, J.A. 90.
11. Helford testimony, J.A. 175-176; Lewis testimony, J.A. 58-59.
12. Helford testimony, J.A. 174-175.

which would not be understood as a serious interview with Falwell.[13]

The only evidence relating to emotional distress suffered by Falwell was his own testimony that he was very angry[14] and "felt like weeping," but did not,[15] and the testimony of a close associate, Dr. Ron Godwin, that "in subtle ways" Falwell's demeanor and behavior had been affected, although Godwin could not articulate how they had been affected,[16] that "a certain degree" of Falwell's "enthusiasm and optimism, ability to concentrate, to focus on the myriad details of organizations such as [Moral Majority] . . . was diminished,"[17] and that Falwell was "preoccupied."[18]

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13. The sole source of any evidence of ill will is found in the deposition testimony of Flynt, which had been taken six months before the trial when Flynt was in prison and in the grips of a manic-depressive disorder (from which he had recovered by the time of the trial). It is the testimony from this deposition which is cited by the Court of Appeals opinion as evidence of malice and intent to harm. See 797 F.2d at 1273. The district court had originally excluded this deposition, which was on videotape, from evidence because it had concluded that Flynt had not been competent to testify at the time. The order excluding the deposition from evidence and reciting the grounds therefor is reproduced at J.A. 35. At trial, the court reversed itself and permitted the videotape to be played. Ample testimony that Flynt had not been competent at the time of the deposition was given by Dr. Saul Niedorf, his treating psychiatrist who testified at trial. Dr. Niedorf's testimony may be found in the trial transcript for Dec. 6. 1984, at pp. 200-280, and is reproduced in part at J.A. 69-87.
14. J.A. 39.
15. *Id.*
16. J.A. 54-55.
17. *Id.*
18. J.A. 54.

In contrast to this testimony relating to emotional distress, Falwell admitted that his busy schedule had not been cut back at all as a result of his emotional distress[19] and that he had continued to follow a regime in which he worked from 5:45 a.m. to midnight or 1:00 a.m. daily and traveled 400,000 miles and gave 1200 speeches per year,[20] a schedule which Godwin described as "exhausting."[21] He had not sought any form of counseling to deal with his emotional distress[22] and was used to being subjected to criticism by various publications.[23] Godwin admitted that Falwell exhibited no "overt emotion" in response to the parody.[24]

The only objective evidence relating to Falwell's reaction to the ad parody was his mailing of hundreds of thousands of copies of the parody to his supporters as part of a fundraising campaign for two organizations headed by Falwell, Moral Majority and Old Time Gospel Hour. The parody was a very effective fundraising vehicle, bringing in approximately $800,000 in contributions.[25]

At the close of the evidence the Court granted defendants a directed verdict on the invasion of privacy claim. The jury returned a verdict for the defendants

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19. J.A. 42.
20. J.A. 38-39.
21. J.A. 52.
22. J.A. 42.
23. J.A. 43-44.
24. J.A. 55.
25. J.A. 39-41; see *Hustler Magazine, Inc.* v. *Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

on the libel claim, specifically finding that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. (Pet. App. C at C1.) However, the jury found that defendants had intentionally inflicted emotional distress upon Falwell and awarded him $100,000 in compensatory damages. (*Id.* at C3.) The jury also awarded $50,000 in punitive damages against each of the two defendants, Hustler Magazine, Inc. and Larry Flynt. (*Id.* at C4.)[26] Thus, Falwell obtained a judgment in the amount of $200,000.

Post-trial, defendants moved for judgment notwithstanding the verdict, arguing, *inter alia*, that the law of libel provided the exclusive remedy for respondent and that its defenses and protections could not be evaded by pleading intentional infliction of emotional distress; that because the ad parody was not published with "actual malice," i.e. knowing or reckless falsity, the First Amendment barred recovery under the theory of intentional infliction of emotional distress; that because the ad parody consisted of opinion and rhetorical hyperbole, recovery was barred under any tort theory; and that plaintiff had not proved the elements of the tort of intentional infliction of emotional distress, including the requirement that Falwell's emotional distress be severe. The District Court denied the motion in an unreported opinion on April 19, 1985. [Pet. App. D.] The court mentioned the First Amendment defenses only in passing, dismissing the argument that plaintiff's recovery "would chill legitimate,

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26. The jury returned a verdict in favor of a third defendant, Flynt Distributing Company, Inc.

protected speech" with the comment that "unique facts here . . . do not lend themselves to a broad statement of law." [Pet. App. D at D9.] Moreover, liability was predicated not upon the publication of the parody, but upon its use as "vehicle" for defendant Flynt's "conduct." *Id.* at D8. Addressing the elements of the tort of intentional infliction of emotional distress, the court held that the requirement of intent was satisfied by Flynt's deposition testimony to the effect that he wanted to upset Falwell and attack his integrity. *Id.* at D4. Characterizing the ad parody as a "personal attack [in the] form of a graphic mischaracterization of plaintiff's relationship with his own mother and of his personal moral practices," the court concluded that there was sufficient evidence for the jury to find that the publication was outrageous and that Falwell's emotional distress was "severe." *Id.* at D5.

Defendants appealed, raising the same issues presented to the district court. Addressing the First Amendment issues, the Court of Appeals concluded that although the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), must be met in order to prevail on Falwell's claim of intentional infliction of emotional distress, that standard "merely increases the level of fault" which must be proved with respect to the traditional elements of the tort. Thus, actual malice in this context does not mean "knowledge of falsity or reckless disregard of the truth," but simply requires that the defendants must have acted intentionally or recklessly. 797 F.2d at 1275. The Court concluded that actual malice in this context thus does not require knowing or reckless falsity.

Because the jury had found that defendants had engaged in such intentional conduct, the Court rejected defendants' "actual malice" defense. The Court did not engage in an independent review of the record on this issue or require proof by clear and convincing evidence.

The Court quickly dismissed the defense that the parody was opinion and rhetorical hyperbole, concluding that there was no need to consider whether the statements were opinion when the jury had found defendants' conduct to be outrageous. *Id.* 1276.

On November 4, 1986, the Court denied a petition for rehearing *en banc* by a vote of 6 to 5. Two dissenting opinions were filed (Pet. App. B.) and are reported at 805 F.2d 484. Judge Wilkinson, in a lengthy dissent joined by three other members of the Court, warned that to permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law since *New York Times v. Sullivan, supra,* and that permitting a public figure to recover for emotional harm based upon political satire or humor threatens to stifle "the long tradition of satiric commentary" and political debate. 805 F.2d at 487. He observed that the Court's ruling would permit use of the tort of intentional infliction of emotional distress to "recover for a perfectly true statement," that it ignored repeated statements of this Court that "a defendant cannot be liable merely because he intended his statement to inflict harm," and that it "gives the jury almost unlimited discretion" to determine what speech is acceptable and what speech is outrageous (and therefore tortious). 805 F.2d at 488-89.

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SUMMARY OF ARGUMENT

By permitting a public figure who cannot prove libel to recover substantial compensatory and punitive damages for alleged injurious falsehood based upon the alternative theory of intentional infliction of emotional distress, the Court of Appeals has eviscerated the protections which this Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny.

The protections afforded to the press by the First Amendment do not depend upon labels created by state law. *Id.* at 289. The First Amendment forbids a public figure for recovering for libel based upon rhetorical hyperbole or statements which are not published with knowing or reckless falsity, and those constitutional defenses cannot be circumvented simply by pleading an alternative theory of relief. To hold otherwise is to render them meaningless.

The defenses that a statement is rhetorical hyperbole and opinion, and that it was not made with knowing or reckless falsity, find their source not in the common law of libel but in the First Amendment. They are based on a "profound national commitment" to "uninhibited, robust, and wide-open" debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. at 271. They apply whether a public official claims libel or intentional infliction of emotional distress.

In this case, the jury concluded that the ad parody "could [not] reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated." [Pet. App. C at C1.] Plaintiff has not challenged this finding; nor has he challenged the verdict for the defendants on his libel claim. This Court is thus presented with a case where a public figure has recovered substantial damages for alleged injurious falsehood based upon a non-libelous publication which consisted of rhetorical hyperbole and opinion and which was not published with knowing or reckless falsity.

Because, as the jury found, the parody contained nothing which would be understood as a statement of fact about Falwell, it falls within this Court's decisions defining constitutionally protected rhetorical hyperbole. *See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). The parody is simply an example of humorous opinion which has a long tradition in American political and social commentary. Questions of good taste are irrelevant. First Amendment principles clearly immunize it from liability, whether for libel or for other torts.

The Court of Appeals incorrectly concluded that in a suit for intentional infliction of emotional distress based upon a publication containing allegedly injurious falsehoods, the "actual malice" required by the First Amendment is satisfied when the defendants' conduct was "intentional or reckless." This flies in the face of this Court's pronouncements that the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to harm by publishing a *falsehood* about the public figure. *Garrison v. State of Louisiana*, 379 U.S. 64, 73-74 (1964).

Moreover, because there was no false statement of fact about plaintiff in the ad parody, an essential ingredient of *New York Times v. Sullivan* "actual malice" is missing. *See Letter Carriers v. Austin, supra,* 418 U.S. at 284. Further, there was no knowing or reckless falsity in the ad parody because defendants subjectively (and correctly) believed that they were not publishing anything which would be interpreted as a representation of fact about Falwell.

Even if one could accept the Court of Appeals' view that intent to inflict emotional distress satisfies First Amendment requirements, an independent review of the record, *Bose v. Consumers Union of U.S., Inc.,* 466 U.S. 485 (1984),—which the Court of Appeals failed to conduct —does not reveal clear and convincing evidence, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342 (1974), of such "actual malice." The substance of the evidence was that defendants simply intended to publish humorous social and political commentary.

The law of libel is well equipped to deal with publications such as the ad parody in this case. If a publication of this type does not meet the requirements of libel, it is because society has recognized that such publications should not be actionable. If a publication is libelous, a plaintiff may recover for emotional distress. *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 350; *Fleming v. Moore,* 221 Va. 884, 275 S.E.2d 632, 639 (1981). In no event should the plaintiff be permitted to circumvent the restrictions imposed by the law of libel and the First Amendment by repleading his case under another name. *See Flynn v. Higham,* 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (1983).

Finally, plaintiff's claim was fatally defective because there was no evidence that he suffered *severe* emotional distress. The applicable tort law requires no less. More important, our profound national commitment to freedom of expression requires that public figures toughen their hides in order to be "able to thrive in a hardy climate." *New York Times Co. v. Sullivan,* 376 U.S. at 273.

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ARGUMENT

I

FIRST AMENDMENT DEFENSES APPLICABLE TO LIBEL APPLY TO CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON PUBLICATION OF ALLEGED INJURIOUS FALSEHOODS

Although the Court of Appeals recognized that the First Amendment must be considered in ruling upon Falwell's claim of intentional infliction of emotional distress, the Court found that First Amendment standards were satisfied by application of the tort's common law requirement of intentional conduct. The Court therefore rejected the defense that the parody was published without actual malice as defined in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), *i.e.,* without "knowledge of falsity or reckless disregard of the truth," as well as the defense that the parody consisted of protected opinion and rhetorical hyperbole. 797 F.2d at 1273-76.

The Court of Appeals thus departed from the clear teachings of this Court that First Amendment protection does not depend upon the label which state law chooses to

affix to a claim. Thus, in *New York Times Co. v. Sullivan*, the Court stated:

> [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismatic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

376 U.S. at 269 (citation omitted). *See also N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963). Thus, the protection of the First Amendment extends to any theories of liability which might result in the repression of free speech. As the Court commented in *Sullivan*, the First Amendment represents

> a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. at 270. To permit a tort plaintiff to inhibit such speech is impermissible whether the plaintiff pleads libel, intentional infliction of emotional distress, or any other theory of liability.

In keeping with this principle, the California Supreme Court recently observed that "Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so

too does a very pragmatic concern. If these limitations applied only to actions denominated 'defamation,' they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than 'defamation' to their injurious-falsehood claim—a task that appears easy to accomplish as a general matter—and thereby avoid the operation of the limitations and frustrate their underlying purpose." *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1044-1045, 728 P.2d 1177, 232 Cal.Rptr. 542 (1986) (parenthetical matter deleted). Falwell has accomplished exactly that which *Blatty* warned against: in addition to asserting his flawed libel claim, he also claimed intentional infliction of emotional distress based upon the same alleged injurious falsehood in an attempt to avoid the First Amendment and common law defenses applicable to his libel claim.

As also noted in *Blatty*, the concern over such alternative pleading is not mere unsupported speculation. In recent years it has become common practice for plaintiffs in libel suits to plead alternative theories of relief such as intentional infliction of emotional distress, as defendants can attest from their own experience. *See id.* at 1045; Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24 (1983).

Nor is the concern over such "end runs" around constitutional protections for libel confined to defendants such as *Hustler* Magazine. As Judge Wilkinson pointed out below, permitting claims of intentional infliction of emotional distress to go forward in cases such as this

threaten "the long tradition of satiric commentary" in political debate. 805 F.2d at 484. Political cartoonists and satirists in particular would be threatened by such a development.

As columnist Ellen Goodman observed, "If this decision stands . . . , any satirist or would-be humorist had better watch out for nastiness. Good-bye Saturday Night Live. Hello, pabulum." Ellen Goodman, *Flynt Was Wronged,* Washington Post, Dec. 15, 1984, at 23. The Los Angeles Daily News noted that under the Fourth Circuit's rule, it would not be inconceivable that Vice President Bush could put *Doonesbury's* Garry Trudeau out of business inasmuch as he has claimed that reading attacks on himself in the comic strip makes him a "basket case for the rest of the day". Editorial, *Flynt, Falwell and Free Speech,* Los Angeles Daily News, Dec. 14, 1984.

In *New York Times v. Sullivan, supra,* the Court extensively discussed the Alien and Sedition Acts, noting their unconstitutionality and observing that what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. 376 U.S. at 276-77. Yet the result below is to permit civil liability to attach in a similar situation. It is noteworthy that one of the victims of prosecution under these acts, Luther Baldwin, was prosecuted simply for expressing an off-color, critical but humorous remark about President Adams.[27] As the Jeffersonian Republican press

27. A twentieth century counterpart to Luther Baldwin was vindicated by this Court in *Watts v. United States,* 394 U.S. 705 (1969). Watts had been prosecuted pursuant to 18

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ironically commented in coming to Baldwin's defense, his prosecution proved "that joking may be very dangerous even to a free country." J. Smith, *Freedom's Fetters* 274 (1956) (quoting *Argus,* Nov. 15, 1799).

Neither the form in which views are expressed—whether a speech, a cartoon, an editorial, a parody or other work of fiction—nor the good or bad taste of the creator may serve to diminish the First Amendment protection to which a publication is entitled. "The line between the informing and the entertaining is too elusive for protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York,* 333 U.S. 507, 510 (1948).

To the best of our knowledge, the only two reported opinions that have considered the ruling below have firmly rejected it. In *Blatty v. New York Times Co., supra,* 42 Cal.3d 1033, 1047-48 (1986), the California Supreme Court stated:

> Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the teaching of *New*

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U.S.C. sec. 871(a) (prohibiting threats on the life of the President) for saying "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court reversed his conviction, characterizing his statement as "political hyperbole," and observed that language in the political arena is often vituperative and abusive. The Court concluded that Watts' "only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708. *See also N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 928 n.1 (1982).

York Times. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity (376 U.S. at pp. 279-280) —even though state law did not require him to do so (*id.* at p. 262). Indeed, in that case the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The *Falwell* Court misses this crucial point and as a result cannot be followed.

See also Ault v. Hustler Magazine, Inc., 13 Med.L.Rptr. (BNA) 1657, 1662 (D.Ore. Oct. 20, 1986).

Moreover, as noted above, Judge Wilkinson's dissent (805 F.2d 484) eloquently expresses the dangers of permitting recovery for emotional distress in the absence of libel. *See also Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress,* 85 Columbia L.Rev. 1749 (1985).

A. First Amendment Protections for Opinion and Rhetorical Hyperbole Preclude a Public Figure's Claim of Intentional Infliction of Emotional Distress Based Upon Alleged Injurious Falsehoods in a Parody Which a Jury Has Found Could Not Reasonably Be Understood as Making Any Statements of Fact

1. The First Amendment Immunizes Opinion and Rhetorical Hyperbole from Liability in a Case Such as This

This Court has long recognized that opinion and rhetorical hyperbole constitute protected speech under the First Amendment and cannot give rise to civil liability. In *Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6 (1970), the Court reversed a libel judgment on the ground that a newspaper's use of the term "blackmail"

to describe a public figure's negotiating position was "no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." *Id.* at 14. This conclusion was based on the fact that no reader could have thought that the plaintiff was actually being charged with the crime of blackmail. *Id.*

This Court again recognized the First Amendment protection for rhetorical hyperbole in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264 (1974). *Letter Carriers* was an action under the Virginia "insulting words" statute, based upon the defendant labor union's characterization in a newsletter of a non-union employee as a "scab" and defining a scab as a "traitor" having "rotten principles" and lacking character. *Id.* at 267, 283. The Court held that such use of epithets "cannot be construed as representations of fact," *id.* at 284, but was merely "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286. The words in question were not actionable because it was impossible to believe that any reader of the newsletter "would have understood the newsletter to be charging the appellees with committing the criminal offense of treason." *Id.* at 285. The Court suggested that the only circumstances in which such words might be actionable would be in circumstances in which they conveyed a false representation of fact. *Id.* No such circumstances are present in this case, as the jury has already found in its unchallenged libel verdict.

By permitting Falwell to recover damages for emotional distress based upon similar rhetorical hyperbole

and lusty, imaginative expressions, the Court of Appeals implicitly rejected the teachings of *Greenbelt* and *Letter Carriers*. This Court did not limit the First Amendment defense of opinion and rhetorical hyperbole to libel claims. As noted above, the First Amendment applies to all claims based upon exercise of freedom of expression. The First Amendment protections for opinion and rhetorical hyperbole must apply to all attempts to impose civil or criminal liability upon speech which falls within that category. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969) (rhetorical hyperbole is protected from prosecution under statute forbidding threats on President's life).

Defendants submit that the proper approach to the rhetorical hyperbole defense in a case involving claims of intentional infliction of emotional distress is that of the Tenth Circuit in *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), another case involving a fictitious work. In *Pring*, as here, the plaintiff alleged libel, invasion of privacy, and intentional infliction of emotional distress. In both cases, the plaintiff was identifiable as the subject of a fictional account. In *Pring*, the court enunciated the test applied by the jury in this case on the libel claim:

> whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.

Id. at 442. The Court held that this test was mandated by the First Amendment protections accorded to opinion or "rhetorical hyperbole," citing *Greenbelt* and *Letter Carriers*. *See also Ollman v. Evans*, 750 F.2d 970, 984 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985); *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986); *Myers v. Boston Magazine, Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980).

In fact, the *Pring* test was also incorporated into the jury instructions given by the court below on Falwell's libel claim. The jury, applying that test, found that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated. [Pet. App. C at C1.]

The Tenth Circuit also held that "the same First Amendment considerations must be applied" to Pring's claim of intentional infliction of emotional distress (called "outrageous conduct" in Wyoming), and therefore refused to entertain her appeal from the dismissal of that claim for the same reason that it reversed her libel judgment. *Pring*, 695 F.2d at 442. In short, the test requiring that the publication be reasonably understood as describing actual facts about the plaintiff or actual events in which he participated applies, as a matter of constitutional law, to emotional distress claims as well. *Accord: Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 557, 558, 216 Cal.Rptr. 252 (1985).

Pring was simply an unremarkable application of this Court's rulings on rhetorical hyperbole. As noted above, in both *Letter Carriers v. Austin, supra*, 418 U.S. 264, and *Greenbelt, supra*, 398 U.S. 6, the Court concluded that the language in question was non-actionable rhetorical hyperbole because it was impossible to believe that any readers would have understood the publication to be charging the plaintiffs with the crimes in question.

The Fourth Circuit itself recognized, several years ago, the importance of the rhetorical hyperbole defense. In *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971) it observed that "To deny the press the right to use hyperbole, under the threat of removing the protecting mantle of *New York Times*, would condemn the press to an arid, desiccated recital of bare facts." Similarly, a leading commentator has noted that "if someone wishes to convey the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images." R. Sack, *Libel, Slander and Related Problems* 246 (1980).

It is, of course, common practice in expressing opinions about public officials and public figures to resort to satire, parody and other imaginative literary devices.[28] The courts have had little difficulty in protecting such expression as opinion and rhetorical hyperbole, notwithstanding the fact that a literal interpretation of the hyperbolic speech might be defamatory and insulting. *See, e.g., Forty v. Chandler*, 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970) (cartoon depicting mayor of Los Angeles at a telephone with men dressed as hospital orderlies and carrying a straitjacket beckoning to him; caption showed mayor saying: "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!");

28. Publications such as editorial cartoons, which are similar in nature to the ad parody here in question, have been held to be protected as rhetorical hyperbole. *See Keller v. Miami Herald Pub. Co.*, 778 F.2d 711 (11th Cir. 1985).

Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376 (1980) (article on "Best & Worst: Sports" which stated that plaintiff sportcaster was "enrolled in a course for remedial speaking;" although article was "rough" and "generally preposterous," statement was hyperbolic and readers would not reasonably understand statement to be an assertion of fact).

In the case at bar, the majority stated, "We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress." 797 F.2d at 1276. The Court therefore concluded that *outrageous* opinion is not entitled to First Amendment protection, despite this Court's numerous holdings to the contrary. In words quoted in virtually every libel case since 1974, this Court pronounced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974):

> Under the First Amendment there is no such thing as a false idea. *However pernicious an opinion may seem*, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. [Emphasis added.]

By simply accepting the notion of "outrageousness" —an element of the tort of intentional infliction of emotional distress—as sufficient to allay fears that the expression of opinion might be actionable, the Court of Appeals ignored the clear teaching of this Court that it is not a proper role for a jury to determine whether an opinion is outrageous. In fact, to invite a jury to pass judgment on opinion based upon the juror's own concepts of what is or is not outrageous (an unacceptably vague

standard even if it were otherwise acceptable; *see* D. Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct,* 82 Colum. L.Rev. 42, 51 (1982); R. Bernstein, *Note: First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress,* 85 Colum. L.Rev. 1749, 1774 (1985)) is to eviscerate the opinion defense and its underlying premise that our society encourages its members to speak their minds and leaves it to the marketplace of ideas to determine what opinions are or are not acceptable.

Permitting liability based on "outrageous" opinion is especially inappropriate in cases of satire and parody. "Since parody seeks to ridicule sacred verities and prevailing mores, it inevitably offends others, as evinced by the shock which Chaucer's *Canterbury Tales* and Voltaire's *Candide* provoked among their contemporaries." *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987).

In ignoring the opinion defense simply because it found the opinions expressed in the parody to be outrageous, the Court of Appeals wrote the First Amendment out of the tort of intentional infliction of emotional distress.[29] If this ruling is permitted to stand, the defense

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29. The Court of Appeals' brief and casual dismissal of the opinion defense may also be read as concluding that this defense need not be reached because defendants were found liable not because of the *statements* in the ad parody—which are nonactionable opinion and rhetorical hyperbole—but simply because of the *publication* of the parody, which is conduct and separately actionable. 797

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of opinion or rhetorical hyperbole will be rendered useless and the law of libel will be rendered obsolete, superseded by the new emotional distress tort which will be free of any constitutional baggage.

2. The Ad Parody Consisted of Rhetorical Hyperbole and Opinion

In the case at bar, the jury's finding on Falwell's libel claim forecloses any question whether the ad parody is rhetorical hyperbole and opinion. The special verdict which the jury returned was tailored to the language of *Pring, Greenbelt* and *Letter Carriers* which defined rhetorical hyperbole. In concluding that the ad parody could

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F.2d at 1276. This is similar to the theory adopted by the District Court, which concluded that "liability is predicated not on *Hustler's* publishing the ad parody, but on Flynt's contributing to the parody and appropriating it for his own malicious purposes." (Pet. App. D. at D8.) The District Court acknowledged that the jury found that the publication of the ad parody was not actionable, but that it was nevertheless the "vehicle by which plaintiff learned of Flynt's outrageous conduct." *Id.* The problem with either of these similar approaches is that they attempt to separate the *content* of one's expression from the *fact* of the expression and purport to punish only the latter. In reality, there is no meaningful distinction between the two. If a statement is not actionable because it is opinion, the simple *publication* of the statement does not transform it into something actionable. Indeed, a statement is not a statement unless it is communicated, and the First Amendment certainly presumes that the expression which it protects will be spoken (freedom of speech) or published (freedom of the press). Similarly, if the ad parody was simply a "vehicle" by which Falwell learned of "Flynt's outrageous conduct", what outrageous conduct did the District Court have in mind? The only "conduct" in question in this case, and the only conduct complained of in the Complaint (J.A. 4 and 13), was the publication of the ad parody.

not reasonably have been understood as describing actual facts about the plaintiff or actual events in which he participated, the jury determined this First Amendment issue in defendants' favor.

Humor such as that contained in the ad parody is a typical form of expression of political opinion. In fact, it has been observed that in politics the use of humor is "indispensable for limiting the war to words." C. Schutz, *Political Humor* 8 (1977). Thus, far from being an instrument designed to cause severe emotional harm to a political figure, humor is a means by which political combat is restricted. *See also id.* at 32, 48. The fact that Falwell finds the type of humor in the ad parody offensive does not make it any less an expression of protected opinion. In fact, " 'dirty' political jokes . . . are necessarily a part of the political culture, and vulgar and blasphemous humor is quintessentially a part of democratic politics." *Id.* at 10. Moreover, the "most common form" of political humor is "political invective" which is "often crude and cruel." *Id.* at 24, 25, 246-7. Sex-related humor is the most popular, continuous and ancient of comic forms. *Id.* at 32. The familiar tale of the politician who said his rival would die of hanging or a dread disease and received the reply that the outcome would depend upon whether he embraced the speaker's principles or his mistress is a well-known case in point which, under plaintiff's theory, would probably be actionable as intentional infliction of emotional distress.

In words which might have been tailored for the case at bar had they not been written years before, one scholar has observed that

> Political humor, with its comic permissiveness toward taboo violations, can be resorted to as disguised aggression against moral and religious pretensions in politics. Moreover, comic blasphemy often makes the assumed moral superiority of some political pretender the target for ridicule.

Id. at 43-44.

The use of such sharp humor as a means of expressing opinion enjoys a long tradition in American political life. Abraham Lincoln is said to have engaged in "jests so coarse that they could not be put to record." *Id.* at 184. *See also* the historical instances enumerated in *Desert Sun Publishing Co. v. Superior Court,* 97 Cal.App.3d 49, 51-52, 158 Cal.Rptr. 519 (1979).

The First Circuit recently recognized that the First Amendment protects ad parodies, even when they are offensive and offend the subject of the parody. In *L.L. Bean, Inc. v. Drake Publishers, Inc.,* 811 F.2d 26 (1st Cir. 1987), the court reversed a grant of summary judgment to an advertiser which had sued a magazine publisher for publishing a sexually explicit parody of the advertiser's catalog. The court held that the plaintiff's claims of trademark dilution were barred by the First Amendment. The court noted that "parody is often offensive, [but] it is nevertheless 'deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.' " *Id.* at 33. Citing *Fisher v. Dees,* 794 F.2d 432, 437-38 (9th Cir. 1986), the court observed that "destructive" parodies play an important role in social and literary criticism and thus merit protection. *Id.* The court concluded that a "judicial evaluation of the offensiveness or unwholesomeness of the appellant's materials" was

impermissible, citing *Cohen v. California,* 403 U.S. 15, 25 (1971). *Id.* at 34. The court concluded:

> Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.

Id.

Thus, humor such as the ad parody is a classic form of expression of opinion, part of a long tradition of political and social discourse.[30] It would violate that tradition as well as the First Amendment values which are inextricably intertwined with that tradition to permit political figures to recover for alleged emotional distress suffered as a result of such satirical comment.

B. The First Amendment Requirement of "Actual Malice" Precludes a Public Figure's Claim of Intentional Infliction of Emotional Distress Based Upon Alleged Injurious Falsehoods in a Parody Unless He Proves with Convincing Clarity that the Parody Was Published with Knowing or Reckless Falsity

1. New York Times v. Sullivan "Actual Malice" is Not Satisfied by Intent to Harm, but Requires Knowing or Reckless Falsity

This Court has held that the First Amendment protects words spoken or published about public figures with

30. Early in his career, Benjamin Franklin followed the lead of Jonathan Swift and, in an early edition of *Poor Richard's Almanack,* reported the imminent death of a rival publisher. When his competitor protested that he was not dead, Poor Richard responded that he was indeed "really defunct and dead." W. Blair, *Horse Sense in American Humor* 17-18 (1942). Such conduct would appear to qualify as intentional infliction of emotional distress under the standards enunciated by the Court of Appeals.

intent to harm, unless the publisher intends to harm *by publishing a falsehood about the public figure.* In *Garrison v. State of Louisiana,* 379 U.S. 64 (1964), the Court stated:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, *permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood,* "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure * * * it may be almost impossible to show freedom from ill-will or selfish political motives." *Id.*, at 893, n. 90.

379 U.S. at 73-74 (emphasis added; ellipsis and brackets in original). Thus, the Court recognized that the interest in fostering the robust expression of opinion which is at the cornerstone of our society bars the states from imposing liability for critical comments about public figures unless such comments are made with an intent to communicate false assertions of fact.

In the case at bar, the Court of Appeals reasoned that although the First Amendment requires a finding of "actual malice" in order for a public figure to prevail on a claim of intentional infliction of emotional distress, the knowing or reckless falsity standard was inapplicable because falsity is not an element of that tort. 797 F.2d at

1275. Thus, the Court of Appeals concluded that First Amendment considerations would be satisfied if the defendant's intentional or reckless conduct has proximately caused emotional distress. *Id.*

This totally ignores the teachings of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *Sullivan* held that speech about a public official may not be subject to liability unless there is clear and convincing evidence that it was made with "actual malice," i.e. knowledge of its falsity or reckless disregard for the truth.[31] This was extended to public figures—a class into which Falwell undeniably falls—in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

As the California Supreme Court observed in *Blatty v. New York Times Co., supra*, 42 Cal.3d at 1047-1048, the Fourth Circuit's interpretation of the *New York Times* actual malice standard as simply increasing the level of fault misunderstands the nature and purpose of the actual malice rule. In *Blatty*, the Court noted that *New York Times v. Sullivan* required a plaintiff to establish falsity even though state law did not necessarily require him to do so, thereby adding the element of falsity to the tort and altering its nature. In *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), the Court similarly altered the nature of criminal libel, imposing a requirement of falsity

31. The case at bar demonstrates the difficulties and pitfalls inherent in the use of the term "actual malice" to describe a state of mind which really has nothing to do with "malice" in the sense that ordinary jurors (or, for that matter, most lawyers) understand the term. *See Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170, 1172 n.1 (S.D.N.Y. 1984).

although "at common law, truth was no defense to criminal libel." *Id.* at 67-68. The Court observed that

> Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace.

Id.

Such an offense, to which truth or falsity was irrelevant, seems much closer to the tort of intentional infliction of emotional distress than to post-*New York Times v. Sullivan* libel. Yet this Court imposed the "knowing or reckless falsity" requirement on civil and criminal libel even though there was nothing in the common law which proscribed the state from creating liability even in the absence of falsity. The same constitutional concerns apply when the plaintiff simply relabels his claim as one for intentional infliction of emotional distress.

The Court of Appeals thus erred in concluding that the explanation for the "knowing or reckless falsity" requirement of *New York Times v. Sullivan* lies in this Court's desire to "increase the level of fault necessary for a public figure to prevail," apparently without regard for the nature of the fault. *See* 797 F.2d at 1275.

Rather, the reason for the imposition of the "knowing or reckless falsity" standard lay in this Court's recognition that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *New York Times v. Sullivan*, 376 U.S. at 269, that free political discussion is maintained "to the end that government may

be responsive to the will of the people and that changes may be obtained by lawful means," *id.*, that it "is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *id.*, that this opportunity is afforded for both "vigorous advocacy" and "abstract discussion," *id.*, that constitutional protection should not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered," *id.* at 271, that "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press," *id.* (quoting Madison in the debates on the federal Constitution), that "erroneous statement . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive,'" *id.* at 271-272, and that our society has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

These principles would be meaningless if they could be circumscribed by a public official or public figure who claims, not that his reputation has been harmed, but that he has suffered emotionally due to such "vehement, caustic, and . . . unpleasantly sharp attacks." This court did not elaborate at length on the fundamental reasons of constitutional policy for requiring proof of knowing or reckless falsity simply because it was adjudicating a libel case rather than an emotional distress case. The law which this Court was applying was not simply the law of libel, but rather the constitutional law of freedom of speech and of the press, which does not depend upon the label which

a plaintiff attaches to his claim. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963).

In cases such as *New York Times v. Sullivan* and *Garrison v. Louisiana, supra*, 379 U.S. 64, the Court recognized that it is a common and even necessary fact of our national political and social life that people will speak out of anger, hatred and ill will when discussing public issues and public figures.[32] Figures such as Jerry Falwell invite heated discussion by entering the public arena and taking controversial stands on issues of the day. One cannot become a public figure only for the purpose of receiving praise from his fellow man; one must also expect to incur the ill will of those who disagree with one's positions. As long as the expression of such ill will is confined to the exercise of freedom of speech and the press, it cannot be constrained.

The Court of Appeals has converted the inquiry about defendants' subjective awareness of falsity into a simple inquiry into malice and intent to harm. *See* 797 F.2d at 1275. As noted above, this Court has repeatedly rejected such a standard. *See, e.g., Garrison v. Louisiana*, discussed *supra*. In *Letter Carriers v. Austin, supra*, 418 U.S. 264, the court reversed a libel judgment for plaintiffs where the trial court had instructed the jury that the defendants were liable if they published with "actual malice,"

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32. Madison recognized this long ago in the Report on the Virginia Resolutions, stating, "[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . ." *See New York Times Co. v. Sullivan*, 376 U.S. at 275 n.15.

incorrectly defined as "some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff." In *Letter Carriers*, there was little doubt that the defendants had acted with such malice, and the jury so found. However, this Court held that such a finding was constitutionally insufficient. "[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Id.* at 281, citing the following cases which also held that instructions permitting a finding of liability based upon spite, ill will or desire to injure are constitutionally impermissible: *Garrison v. Louisiana, supra; Henry v. Collins*, 380 U.S. 356 (1965); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 9-11 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971); and *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

2. The New York Times v. Sullivan Knowing or Reckless Falsity Standard Applies to All Claims of Injurious Falsehood Regardless of the Cause of Action

The reasons set forth above for requiring a public figure to prove knowing or reckless falsity when he claims damage to an injurious falsehood apply regardless of the cause of action the public figure chooses to plead. Thus, the *New York Times v. Sullivan* actual malice requirement is not confined to libel suits, but to any suits attempting to impose civil liability upon critical commentary about public figures. Accordingly, this Court held that knowing or reckless falsehood must be proved in invasion of privacy cases. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

Invasion of privacy, like intentional infliction of emotional distress, is concerned with mental distress rather than injury to reputation. *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983), citing *Time, Inc. v. Hill, supra*, 385 U.S. at 384 n.9. Thus, if the Court of Appeals' analysis herein were correct, a public figure plaintiff should be able to recover damages for invasion of privacy simply by proving intentional conduct by the defendants, without having to prove knowing or reckless falsity.

The logic of the cases requiring a showing of knowing or reckless falsity in invasion of privacy cases requires a similar showing in cases involving intentional infliction of emotional distress. The decision below conflicts with this constitutional principle. Moreover, it is in direct conflict with holdings of other courts.

In *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979), the Seventh Circuit denied relief on a count for intentional infliction of emotional distress, among others, because the court had already concluded that there was no cognizable defamation claim due to a lack of *New York Times v. Sullivan* actual malice. The court concluded, "We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused." 579 F.2d at 1036. The court rejected the notion that " 'malice' or other improper intent" was a sufficient basis for liability: "Where the constitutional right to free speech is involved, as it is here, the *New York Times* standard would be applicable to such an intent inquiry." *Id.* at 1036 n.16.

The California Supreme Court came to a similar conclusion in *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal.Rptr. 137 (1984), *cert. denied*, — U.S. —, 106 S.Ct. 3307 (1986). After holding that a libel claim must fail because the alleged libel was not published with knowing or reckless falsity, the Court addressed the claims of intentional infliction of emotional distress and invasion of privacy:

> Each of these additional causes of action are based upon the same facts as the cause of action for libel. Our conclusion that the plaintiffs have failed to show a triable issue of fact as to actual malice requires summary judgment on every claim based upon the publication of the Reader's Digest article.
>
> The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given to the stated cause of action (*see New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 269); it bars not only actions for defamation, but also claims for invasion of privacy (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 387-388; *Goldman v. Time, Inc.* (N.D.Cal. 1971) 336 F.Supp. 133, 137-138; *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35 fn. 16). Dederich's cause of action for intentional infliction of emotional distress presents an issue of first impression, but fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.

Id. at 265.

This Court has also assumed, without deciding, that the knowing or reckless falsity standard must be met in a product disparagement case. *Bose Corp. v. Consumers*

Union of U.S., Inc., 466 U.S. 485 (1984). In fact, *Letter Carriers v. Austin, supra*, 418 U.S. 264, was actually an action brought under an "insulting words" statute forbidding use of words that are construed as insults and tend to violence and breach of the peace.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), an invasion of privacy case, the Court noted that the actual malice test in such a case was *not* satisfied by common law malice, "frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights." Rather, the test even in a privacy case focuses on the defendant's attitude toward the truth or falsity of the material published. 419 U.S. at 252. The same is obviously true when the plaintiff alleges intentional infliction of emotional distress.

3. Defendants Did Not Publish the Ad Parody with Knowing or Reckless Falsity

Clearly, Petitioners did not publish the ad parody in this case with knowing or reckless falsity. As the jury concluded, the ad parody did not make any false statements of fact about the plaintiff. As the Court stated in *Letter Carriers v. Austin, supra*, 418 U.S. at 284, "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact." *See also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977) ("Before knowing falsity or reckless disregard for the truth can be established, the plaintiff must establish that the statement was false.").

Having failed to establish this prerequisite to a finding of actual malice, Falwell has failed to overcome the barrier which the First Amendment imposes on public

figures seeking to recover damages for injurious falsehoods.

Even if one were to ignore the fact that the ad parody actually contained no false statements of fact, an examination of defendants' state of mind in light of the *New York Times v. Sullivan* standard reveals that the parody was not published with the requisite knowing or reckless falsity. As is set forth above (pp. 3-5), defendants did not believe they were publishing false statements of fact; they reasonably believed that the parody would be understood as humor and would not be taken seriously. The jury obviously agreed when it returned its libel verdict.

Under the circumstances, defendants certainly did not publish with knowledge that they were publishing false statements. Nor did they publish with reckless disregard for the truth, which requires a subjective awareness of a high degree of probability that one is publishing falsity and the entertainment of serious doubts about the truth of the publication. *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968).

When frankly fictitious works such as parodies are involved, such subjective awareness of falsity necessarily requires that the publisher be aware that readers are likely to believe that they are reading factual statements about the plaintiff. Any other interpretation of the *New York Times v. Sullivan* standard would disable comedians, editorial cartoonists, or novelists from depicting public figures in any situation that was not literally true, even though the audience is aware that the joke, cartoon or fiction is not intended to represent literal reality.

Courts which have been confronted with such situations have recognized that the *New York Times v. Sullivan* standard requires an inquiry into what the author believed his publication would be interpreted as saying. *See Tilton v. Cowles Publishing Co.,* 76 Wash.2d 707, 725, 459 P.2d 8 (1969) ("in order to find actual malice, . . . plaintiffs must prove with convincing clarity that defendant was aware of a high probability that the public would read the article as reporting a criminal charge, or at least that the defendant entertained serious doubts on this matter."); *Woods v. Evansville Press Co.,* 791 F.2d 480, 487 (7th Cir. 1986) (although article was capable of supporting false and defamatory implications, plaintiff failed to prove actual malice because there was no evidence that defendants interpreted the article they published in that manner; publisher must intend the defamatory implication); *Miss America Pageant, Inc. v. Penthouse International, Ltd.,* 524 F.Supp. 1280, 1286-7 (D.N.J. 1981) (summary judgment for defendants based on same facts as in *Pring v. Penthouse, supra,* because defendants believed they were publishing a fictitious work and had neither subjective awareness that they were publishing a falsity nor intent to publish falsely); *Fong v. Merena,* 66 Haw. 72, 655 P.2d 875 (1982) (although defendant's sign could be construed in false and defamatory manner, there was not clear and convincing evidence that defendant construed it in that manner); *Polakoff v. Harcourt Brace Jovanovich, Inc.,* 3 Med.L.Rptr. 2516, 2517 (N.Y.Sup.Ct. 1978), *aff'd,* 67 A.D.2d 871, 413 N.Y.S.2d 537, *appeal dismissed,* 48 N.Y.2d 714, 397 N.E.2d 1182 (1979) (reader must conclude "that the author intended the reader to believe that

Moses Polakoff participated in procuring an assassin as described in the book'').

See also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512-513 (1984), where the Court concluded that there was insufficient evidence of knowing or reckless falsity when the author of the disparaging article chose words which inaccurately and disparagingly described the plaintiff's product, but did not realize that his words would be so understood.

The appropriate inquiry thus is not whether defendants knew that the statements ascribed to Falwell in the ad parody were objectively false. Rather,

> Under *New York Times* and *Gertz*, the focus should be on subjective awareness of the defendant with respect to the manner in which he believes his humorous communication will be understood. If he thinks he is conveying an idea or a joke, he should be protected; if he knows or believes he will be understood to be conveying a statement of fact that he knows or believes is false, he should not be protected.

Sack, *Libel, Slander and Related Problems* 241 (1980).

In *Good Government Group of Seal Beach, Inc. v. Superior Court*, 22 Cal.3d 672, 684, 150 Cal.Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979), the court expressed the same thought in another way, concluding that

> It is clear that honest belief of the defendant is the touchstone of the privilege enunciated in *New York Times*, and that a statement is entitled to constitutional protection if the words used are ambiguous *but the defendant honestly and without recklessness believes that they constitute an opinion or idea.* [Emphasis added.]

In the case at bar, it is clear that defendants did honestly believe that they were expressing opinions and ideas rather than statements of fact. The jury came to the same conclusion. Falwell thus did not surmount the constitutional barrier of actual malice, as properly defined. The Court of Appeals' test, based solely upon intent to harm, is constitutionally inadequate.

4. An Independent Review of the Evidence Would Establish the Lack of Clear and Convincing Evidence of Malice

Even if the Court of Appeals were correct in concluding that for purposes of the emotional distress tort the First Amendment requires nothing more than a showing of intentional conduct, the Court of Appeals did not pursue its constitutional mandate to conduct an independent review of the evidence and to find such malice by clear and convincing evidence.

In concluding that actual malice was present in this case, the Court of Appeals simply deferred to the jury's finding that defendants had engaged in willful conduct. 797 F.2d at 1275-1277. However, this Court has held that in reviewing First Amendment defenses, appellate courts must engage in an independent, *de novo* review of questions of "constitutional fact." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose*, the Court observed that such independent review is required in all varieties of cases involving First Amendment defenses, including but not limited to libel. Thus, the Court of Appeals improperly avoided its obligation to conduct

such an independent review when it deferred to the jury's finding.

Moreover, the jury's finding of malice, which the Court of Appeals concluded satisfied the constitutional standard, was made as part of its review of the elements of the tort of intentional infliction of emotional distress. The jury therefore decided this issue by a preponderance of evidence. Actual malice, on the other hand, must be proven by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Defendants submit that an independent review of the evidence herein can only lead to the conclusion that there was not clear and convincing evidence that the ad parody was published with actual malice, even when such malice is redefined as the Court of Appeals defined it. As is set forth in the Statement of the Case (pp. 3-5, *supra*), the evidence shows that defendants' only intent in publishing the ad parody was to make a humorous social and political comment, not to harm Falwell.

C. A Public Figure May Not Recover Damages for Injured Feelings Caused by Allegedly Injurious Falsehoods in a Parody When the Parody Caused No Harm to his Reputation

The First Amendment defenses addressed above mandate reversal in this case not simply because of a mechanical application of the rhetorical hyperbole and knowing or reckless falsity defenses, but because the policies which have led the Court to adopt these defenses would be offended and endangered if a public figure could recover for emotional distress based upon expression such as the ad parody.

A number of courts have held that the tort of intentional infliction of emotional distress may not be utilized to recover damages when the gravamen of the complaint is really that of libel. *See Flynn v. Higham, supra,* 149 Cal. App.3d 677; *Todd v. South Carolina Farm Bureau Mutual Insurance Company,* 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds,* 287 S.C. 190, 336 S.E.2d 472 (1985); *Ault v. Hustler Magazine, Inc., supra,* 13 Med. L.Rptr. (BNA) 1657. One of the most recent jurisdictions to recognize this was New York, whose highest court stated, "It would be improper to permit plaintiff to evade the specific prerequisites for a libel action by presenting his cause of action in terms of the generalized tort of intentional infliction of emotional distress." *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 66 N.Y.2d 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297 (1985). *See also Fischer v. Maloney,* 43 N.Y.2d 553, 558, 373 N.E.2d 1215, 402 N.Y.S. 2d 991, 993 (1978).

A California appellate court elaborated on the same theme in *Flynn v. Higham,* 149 Cal.App.3d 677, 197 Cal. Rptr. 145 (1983), when it held that a claim of intentional infliction of emotional distress cannot be maintained based upon the same acts which were insufficient to support a cause of action for defamation. The court reasoned:

> It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a

> separate tort. To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step toward "swallowing up and engulfing the whole law of public defamation."

149 Cal.App.3d at 681. The quotation from Dean Prosser was from an article addressing the expansion of the tort of invasion of privacy, but his words apply equally to suits for intentional infliction of emotional distress. Dean Prosser noted that if plaintiffs could plead invasion of privacy whenever they have been libelled, "it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?" W. Prosser, *Privacy*, 48 Cal.L.Rev. 383, 401 (1960).

Recognizing the dangers warned of by Dean Prosser, the *Flynn* court concluded:

> to allow an independent cause of action for the intentional infliction of emotional distress, based upon the same acts which would not support a defamation action, would allow plaintiffs to do indirectly that which they could not do directly. It would also render meaningless any defense of truth or privilege.

149 Cal.App.3d at 682. The court therefore rejected an emotional distress claim appended to a defective libel claim.

The law of libel already provides a remedy for public figures who suffer emotional distress as a result of injurious falsehood. Damages may be awarded for such distress if the plaintiff is able to prove that he was libelled.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632, 639 (1981). There is therefore no justification for expanding the tort of intentional infliction of emotional distress to provide an additional means to recover such damages, especially when it permits the plaintiff to avoid the carefully constructed requirements of the law of libel.

Defendants submit that the Court of Appeals incorrectly concluded that Virginia would recognize the tort of intentional infliction of emotional distress arising out of the same facts as a defective libel claim. Moreover, we submit that the First Amendment forbids the use of the tort of intentional infliction of emotional distress as a substitute for libel, especially when the claim is brought by a public figure or public official. Perhaps President Truman expressed the thought most aptly when he stated, "If you can't stand the heat, get out of the kitchen." Parsonages such as Jerry Falwell who voluntarily choose to place themselves before the public as paragons of virtue and who enjoy immense power in the political life of the nation must be expected to endure the rough and tumble life of political debate. Unless subjected to false statements of fact, in which there is no constitutional value, they should be expected to have toughened their hides to withstand the insult and invective that often accompany heated comment on the issues of the day. "[V]ehement, caustic, and sometimes unpleasantly sharp attacks" often seem necessary to accompany our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *See New York Times Co. v. Sullivan, supra*, 376 U.S. at 270. The First Amendment does not ask too much of public officials

and public figures such as Respondent if it requires them to limit their remedies for harsh words to situations in which they are the subjects of defamatory falsehoods. Rather, it is to be expected that such public figures will be "men of fortitude, able to thrive in a hardy climate." *See id.* at 273.

Indeed, even in the absence of First Amendment considerations the tort of intentional infliction of emotional distress requires a high threshold before a plaintiff can recover. As comment d to Section 46 of the Restatement (Second) of the Law of Torts (governing intentional infliction of emotional distress) notes, "The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind."

II

A PUBLIC FIGURE MAY NOT PREVAIL ON A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON ALLEGED INJURIOUS FALSEHOODS IN A PARODY UNLESS HE PROVES THAT HE SUFFERED EMOTIONAL DISTRESS

As noted in the Statement (*supra* at 5-6), Falwell's evidence of emotional distress was limited to his own testimony that he was angry and "felt like weeping" and the testimony of a close colleague that his enthusiasm and optimism were somewhat diminished in subtle ways. Such damages are insufficient to justify the recovery of substantial compensatory and punitive damages based upon

critical commentary about a public figure. Neither the common law of Virginia nor the First Amendment permits such an award.

Comment j to Section 46 of the Restatement (Second) of Torts (governing the tort of intentional infliction of emotional distress) states the degree of emotional distress which must have been suffered in order to recover:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises.* Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. *The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.* The intensity and the duration of the distress are factors to be considered in determining its severity.

[Emphasis added.] Indeed, comment k notes that "normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm which in itself affords evidence that the distress is genuine and severe."

Virginia courts have followed the Restatement and have adopted the requirement that in order to recover for intentional infliction of emotional distress, the distress must be "severe." *See Naccash v. Burger,* 223 Va. 406, 416, 290 S.E.2d 825 (1982).

The evidence of plaintiff's emotional distress in the case at bar was utterly insufficient to cross this threshold. To permit Falwell to recover substantial damages based upon such a showing is to invite all public figures and public officials to fabricate vague claims of emotional upset in order to recover for unkind language which would not qualify as libelous.

Defendants provided both courts below with citations to a large number of reported cases in which claims were dismissed due to inadequately severe emotional distress on showings of distress far more severe than that which Falwell proved. *See, e.g., Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87, 89 (3d Cir. 1980); *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). *See also Nekolny v. Painter*, 653 F.2d 1164, 1172 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). In contrast, plaintiff could not cite a single case in which a showing as vague and sketchy as his showing in this case had been upheld as being sufficiently severe to meet the requirements of the tort.

Not only do the common law requirements of the tort require a showing of severe emotional distress, but the First Amendment also requires such proof. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (First Amendment requires plaintiff in libel suit to prove actual injury by competent evidence); *cf. Carey v. Piphus*, 435 U.S. 247, 260-264 (1978). As noted above, public officials and public figures must be expected to endure a certain degree of caustic criticism. Mere hurt feelings are constitutionally insufficient to justify the imposition of substantial damages upon one who chooses to speak his mind, however unkindly, about a public personage.

CONCLUSION

If the opinion below is permitted to stand, the law of libel and the First Amendment protections which have grown up around it will be fatally undermined. Defamation law will fall into disuse because it will be so much easier for a public figure to prove intentional infliction of emotional distress without having to prove that the defendant made a false statement of fact, or that the defendant spoke or published with knowing or reckless falsity.

It is not only the *Hustler* magazines of this world which will be threatened if Respondent is allowed to prevail. As Judge Wilkinson noted, "To permit political figures to recover solely for emotional harm may in the end circumvent the careful development of the law of defamation since *New York Times v. Sullivan*." 805 F.2d at 484. If the Court of Appeals' holding remains the law, nobody will dare to speak with ill will toward a public figure. The self-censorship which the *New York Times v. Sullivan* actual malice rule was intended to prevent will stay the pen of every editorial cartoonist and columnist who considers writing about a public figure whom he or she dislikes. The decision below is a dangerous one in a society which values wide-open debate.

The decision of the Court of Appeals is bound to have a chilling effect upon the free exercise of First Amendment rights unless this Court reverses the decision of the

Court of Appeals and orders that judgment be entered for the defendants.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-1278

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,

Petitioners,

v.

JERRY FALWELL,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the actual malice test applicable to a public figure defamation case should be applied literally and mechanically to the tort of intentional infliction of emotional distress?

a. Can Virginia's interest in protecting its citizens from the intentional infliction of emotional distress ever outweigh the First Amendment interest in free expression?

b. Should the actual malice standard of defamation law, requiring a knowing or reckless "falsehood," automatically and invariably be applied as the constitutional test for all state-created torts, even in those cases where a false statement of fact is not an element of the tort?

c. Is the First Amendment interest in free speech adequately protected by a test which imposes liability for the intentional, culpable infliction of emotional distress?

d. Whether under the facts of this case plaintiff has satisfied the constitutional test applicable to the tort of intentional infliction of emotional distress?

2. Whether the defendants' extreme and offensive publication is entitled to absolute constitutional protection simply because they contend it constitutes opinion or rhetorical hyperbole?

a. Whether, as a matter of law, the accusations of the publication constitute opinion rather than false statements of fact?

b. Should the doctrine of opinion which has been developed as a constitutional defense in defamation actions be applied to the tort of intentional infliction of emotional distress?

c. Is a plaintiff who does not succeed in a libel claim thereby automatically barred under the First Amendment from legal redress for speech which is so intentionally vicious and outrageous and causes such severe emotional distress that it ought not to be tolerated in a civilized society?

3. Whether this Court should independently review plaintiff's proof of damages?

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Statement of the Case

Hustler Magazine is a monthly magazine published by both the corporate defendant Hustler Magazine, Inc. and the individual defendant Larry Flynt.[1] This lawsuit arose out of the publication of an offensive and vulgar "interview" of Reverend Jerry Falwell which appeared on the inside front cover of the November 1983 issue of Hustler Magazine. The "interview" was fabricated by the defendants and presented as an "advertisement" for Campari liquor (hereinafter the "Falwell Campari ad").[2]

The Falwell Campari ad published the "interview" in question and answer format and included a genuine photograph of Reverend Falwell. It was entitled "Jerry Falwell talks about his first time," and appropriated the trademark and registered copyright of Campari liquor. In miniscule type at the bottom of the page, the words "ad parody" appeared.

The text of the "interview" accused Falwell of committing incest with his mother in an outhouse in Lynchburg, Virginia, portrayed his mother as being a local prostitute, and charged that Reverend Falwell preaches while intoxicated.

Despite the words "ad parody" in miniscule type at the bottom of the page, the publication was presented as a genuine

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[1] Plaintiff's Exhibit 1, Joint Appendix (hereinafter "J.A.") J.A. _____ [Joint Appendix on Appeal 1505, 1506].

[2] Id., J.A. at _____ [Joint Appendix on Appeal 1503].

Campari advertisement. This is established in part by the fact that shortly after the unauthorized publication of the Campari name, copyright and registered trademark, Campari's advertising agency wrote to Larry Flynt on October 7, 1983 concerning this wrongful use of its property as well as resultant embarrassment and damage it caused.[3] That letter was received by Hustler's legal department on October 12, 1983, but was ignored. At trial, Robert Jordan, the chairman of the board of Campari's advertising agency, testified that Campari spent about $3 million in an advertising campaign over a three-year period, that Hustler misappropriated its copyright and trademark registration without seeking permission or approval, the Falwell Campari ad appeared to be a pirated version of an authentic Campari ad and no response was ever received to the letter of October 12, 1983.[4]

Larry Flynt was personally involved in approving the publication of the Falwell Campari ad. According to the deposition testimony of Hustler's senior editor Bruce Helford, the copy was taken "directly to Larry" in order to "expedite" editorial approval and immediate publication.[5] The Falwell Campari ad was presented to Larry Flynt, who reviewed the text,

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[3] Plaintiff's Exhibit q, J.A. _____ [Joint Appendix on Appeal 1831].

[4] Jordan testimony, J.A. _____ [Joint Appendix on Appeal 913-28].

[5] Helford testimony, J.A. _____ [Joint Appendix on Appeal 1407].

approved it for publication and personally initialed the copy so that there could be no doubt about its inclusion in the forthcoming edition of Hustler Magazine.[6] In his own profane way, Flynt confirmed that everything published in Hustler Magazine had to have his express approval.[7] Even though the editors and their legal counsel discussed the possibility that Reverend Falwell would bring a lawsuit,[8] they decided to publish the Falwell Campari ad anyway.

Plaintiff filed this lawsuit on or about October 31, 1983,[9] shortly after the November 1983 issue of Hustler Magazine was generally available for sale to the public. At that time, the defendants were placed on notice that plaintiff was seeking substantial monetary damages for invasion of privacy, libel and the intentional infliction of emotional distress.[10] Nevertheless, only a few months later and during the pendency of this lawsuit, the defendants republished the

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6 Helford testimony, J.A. _____ [Joint Appendix on Appeal 1408]; Flynt testimony, J.A. _____ [Joint Appendix on Appeal 875]. Plaintiff's Exhibit 6, J.A. _____ [Joint Appendix on Appeal 1822].

7 Flynt testimony, J.A. _____ [Joint Appendix on Appeal 868, 869].

8 Garrett testimony, J.A. _____ [Joint Appendix on Appeal 1427].

9 Docket Entries, J.A. _____ [Joint Appendix on Appeal 2]; Complaint, J.A. _____ [Joint Appendix on Appeal 13].

10 Complaint, J.A. _____ [Joint Appendix on Appeal 13-19].

same offensive publication in the March 1984 issue of Hustler Magazine,[11] in which Larry Flynt is listed as "editor."[12]

The publication of the so-called Falwell Campari ad in November 1983 followed years of vicious attacks against Reverend Falwell within the pages of Hustler Magazine.[13] Yet Reverend Falwell refrained from commencing legal proceedings against what could arguably be characterized as social or political lampoons, however vile and demeaning in nature. But when Flynt published the outrageous accusation of incest involving Reverend Falwell's deceased mother, without any apparent social or political motive or message, Reverend Falwell could no longer tolerate such a personal blow and sought immediate legal redress.

Flynt explained that his true motive was "to settle a score" and "to get even" with Reverend Falwell.[14] He

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11 Plaintiff's Exhibit 3, J.A. _____ [Joint Appendix on Appeal 1653, 1672].

12 Plaintiff's Exhibit 3, J.A. _____ [Joint Appendix on Appeal 1656, 1659].

13 See, e.g., Plaintiff's Exhibit 7, J.A. _____ [Joint Appendix on Appeal 1824-1827]; Plaintiff's Exhibit 11, J.A. _____ [Joint Appendix on Appeal 1833]; Plaintiff's Exhibit 12A, J.A. _____ [Joint Appendix on Appeal 1834]; Plaintiff's Exhibit 12B, J.A. _____ [Joint Appendix on Appeal 1835-1838]; Plaintiff's Exhibit 13, J.A. _____ [Joint Appendix on Appeal 1839-1841]; Plaintiff's Exhibit 14, J.A. _____ [Joint Appendix on Appeal 1842]; Plaintiff's Exhibit 15, J.A. _____ [Joint Appendix on Appeal 1843]; Plaintiff's Exhibit 16, J.A. _____ [Joint Appendix on Appeal 1845]; Plaintiff's Exhibit 18, J.A. _____ [Joint Appendix on Appeal 1846]; Plaintiff's Exhibit 20, J.A. _____ [Joint Appendix on Appeal 1848].

14 Flynt testimony, J.A. _____ [Joint Appendix on Appeal 885, 886, 887, 890].

testified that the offensive publication was not even intended to be a parody, but rather was meant to be a truthful publication.[15] As Flynt candidly admitted in the following exchange:

> Q. Mr. Flynt, I take it, then, that from what you're telling me, that this publication about Reverend Falwell and Campari was not intended to parody or exaggerate anything, but to convey the truth, is that right?
>
> A. Yes, sir.[16]

Flynt repeatedly conceded that Hustler's offensive publication about Reverend Falwell was not a parody at all, but was specifically intended to hurt him.[17] Flynt stated that "parody has become so real, we're going to stop doing parody," speaking about his own Hustler Magazine.[18]

With the apparent motive of continuing his attack on Reverend Falwell, Flynt at his deposition insisted that he was "telling the truth" and had as his objective a desire "to upset

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15 Flynt testimony, J.A. _____ [Joint Appendix on Appeal 887].

16 Id. at _____ [Joint Appendix on Appeal 900].

17 Id. at _____ [Joint Appendix on Appeal 907].

18 Id. at _____ [Joint Appendix on Appeal 891-92]. "Parody" is defined as closely imitating another's work for comic effect or ridicule. The Falwell Campari ad imitates and ridicules the literary style and format of the real Campari advertisement, but does not in any way imitate Reverend Falwell's mannor or style. While the Falwell Campari ad may be a parody of Campari, it is not a parody of Reverend Falwell. His role in it is merely to be an innocent victim.

Reverend Falwell."[19] The following testimony epitomizes his evil animus:

> Q. And didn't it occur to you that . . ., you were attacking a man in his profession?
>
> A. Yes.
>
> Q. Did you appreciate, at the time that you wrote "okay", or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?
>
> Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?
>
> A. To assassinate it.[20]

(Emphasis added).

Larry Flynt provided this evidence of his real intention to injure Reverend Falwell rather than satirize him, knowing full well that emotional disturbance can be just as devastating as physical suffering.[21]

The case was tried in December 1984 and on December 8, 1984, the jury completed a Special Verdict Form,[22] finding in favor of Reverend Falwell on his emotional distress claim against Flynt and Hustler in the amount of $100,000 compensatory

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[19] Id. at _____ [Joint Appendix on Appeal 898].

[20] Id. at _____ [Joint Appendix on Appeal 901-02].

[21] Id. at _____ [Joint Appendix on Appeal 904].

[22] J.A. _____ [Joint Appendix on Appeal 540-43].

damages, and further assessing punitive damages of $50,000 against Flynt and $50,000 against Hustler. Following the denial of defendants' post-trial motions, final judgment for plaintiff was entered on April 19, 1985.[23]

By answering the district court's first interrogatory on the Special Verdict Form in the negative, the jury declined to find the defendants liable for defamation. The merely jury found that the offensive publication could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated."[24] Petitioners' constitutional argument which appears throughout their brief filed with this Court depends largely upon their mischaracterization of this jury finding as a conclusive determination that the Falwell Campari ad did not constitute publication of a "statement of fact." However, as more fully explained at pp. 41-43, infra, the jury made no such finding, and no such finding could be rationally made in view of the specific factual assertions contained in the Falwell Campari ad -- instead, the response to interrogatory one was merely a finding that Falwell's reputation had not been damaged. There was no jury finding that the Falwell Campari ad did not assert a false statement of fact. Plaintiff did not appeal from the

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[23] J.A. _____ [Joint Appendix on Appeal 693-97].

[24] The Special Verdict Form, J.A. _____ [Joint Appendix on Appeal 540].

adverse libel verdict because his award for emotional distress vindicated his grievance. Defendants cannot therefore justifiably conclude from the Special Verdict Form that the jury determined that no statements of fact were published about Reverend Falwell.

SUMMARY OF ARGUMENT

The "actual malice" standard for defamation of a public figure should not be literally and mechanically applied to all other torts and especially not to those for which a false statement of fact is irrelevant.

The tort of intentional infliction of emotional distress, recognized under Virginia law, serves to protect important state interests -- interests which are different from the reputational damage protected by libel law.

The result of this constitutuonal balancing process is not necessarily the same for every state-created tort. For example, in a public figure defamation case, the test is "actual malice," i.e., subjective knowledge of falsity or reckless disregard for the truth; whereas, in a claim of appropriation of publicity or public disclosure of private facts, the test may be simply the intent to appropriate or to publish. These state-created torts other than defamation do not necessarily involve broadcasting or publishing a "falsehood," so that defendants' insistence upon the literal application of the actual malice test in every instance of

speech-related conduct results in a completely unrealistic and unworkable rule of constitutional law, which would automatically bar and ignore other vital state interests deserving protection.

The degree of constitutional protection available to speech-related misconduct depends upon the outcome of a balancing process between the state interests sought to be protected by the tort involved and First Amendment considerations of free and open debate. This Court has never interpreted the First Amendment as protecting deliberate character assassination or calculated misdeeds.

The test of culpable, intentional conduct identified by the Court of Appeals is appropriate to the tort of intentional infliction of emotional distress. The verdict below satisfies this constitutional requirement because intentionality is the gravamen of the tort of intentional infliction of emotional distress. This constitutional standard of culpability requires a finding that the defendant intended for wrongful purposes to commit such a heinous act that no civilized person should be forced to endure it. This creates a standard so high that few cases can satisfy it.

The doctrine of opinion or rhetorical hyperbole, moreover, does not automatically insulate defendants from liability under the facts of this case. First, the Falwell Campari ad does not represent an opinion. Instead, it makes specific, declarative accusations of purported fact. Second, the opinion doctrine was developed in the area of defamation

law and has been confined to that tort. Expanding the doctrine beyond defamation will grant irresponsible publishers an open license to devastate and destroy.

The high threshold of proof required for a case of intentional infliction of emotional distress involves intentional conduct as well as conduct that is so excessive and outrageous as to pass beyond all bounds of what can be tolerated in a civilized society. No absolute form of constitutional protection should be accorded to such barbaric behavior. The right to free speech already enjoys numerous substantive and procedural safeguards to insure the preservation of robust political debate and satire.

Finally, it would be inappropriate for this Court to independently review, as defendants request, the proof of damages which support the jury verdict for intentional infliction of emotional distress. The evidence supporting the damage award satisfied the jury, the district court, and the Court of Appeals; and presents no question of constitutional dimension for this Court to consider.

ARGUMENT

I.

THE FIRST AMENDMENT DOES NOT REQUIRE THAT THE JURY VERDICT BE SET ASIDE IN THIS CASE

A. The Appropriate Degree of Constitutional Protection Requires a Balancing Process Rather than Literal Application of the Actual Malice Test

The issue raised by this case was correctly identified by the Court of Appeals: "what form the first amendment protection should take in an action for intentional infliction of emotional distress." 797 F.2d at 1274.

Plaintiff submits that the policies and interests which underlie the protection against intentional infliction of emotional distress must be balanced against those countervailing considerations of free speech and robust debate. It is the result of this balancing process which will determine the appropriate degree of constitutional protection available in this case. Defendants, on the other hand, argue that the "actual malice" test created for purposes of defamation law should be literally and mechanically imposed upon other torts as well. By rigidly applying the standard of "subjective awareness of falsity or reckless disregard for the truth," defendants reach the preordained result they desire to achieve -- that since there was no "falsity" in the Falwell

Campari ad there can be no actual malice in the literal sense as that phrase was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Defendants would eschew the balancing process in order to impose the defamation standard that fulfills their argument that there has not been a "false statement of fact." This argument, however, would automatically bar any redress for speech-related misconduct other than in defamation. However, this Court has never suggested the First Amendment requires such a drastic result. Instead, it has determined the constitutional protection available for specific torts by carefully weighing the state interest and purpose behind the tort alleged against the First Amendment values at stake.

Following New York Times Co. v. Sullivan, the next tort case which presented this Court with a direct conflict between state-created tort liability and First Amendment principles was Time v. Hill, 385 U.S. 374 (1967). Although the actual malice standard of New York Times Co. v. Sullivan was deemed applicable to that "false light" invasion of privacy case, the result was not achieved by "blind application" of the rule, but rather by careful balancing. As Justice Brennan explained in the majority opinion:

> We find applicable here the standard of knowing or reckless falsehood, not through blind application of New York Times Co. v. Sullivan, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York

> statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. Id. at 390-91.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 499-500 (1975), this Court explained that the constitutional balance depends upon the interests a state is seeking to protect:

> In Gertz we recognized the need to establish a broad rule of general applicability, acknowledging that such an approach necessarily requires treating alike cases that involve differences as well as similarities. Id. at 343-344, 41 L Ed 2d 789. Of course, no rule of law is infinitely elastic. In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance to be struck. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions.

This Court has therefore recognized the danger of indiscriminate adoption of the constitutional protections created for defamation law to other torts. Such "blind application" of constitutionalized libel rules to other torts would create irreconcilable confusion. The Court of Appeals correctly rejected the slavish adherence to literalism urged by

the defendants: "While we agree that the same level of protection is due the defendants, we do not believe that the literal application of the actual malice standard which they seek is appropriate in an action for intentional infliction of emotional distress." 797 F.2d at 1274.

B. The Actual Malice Test of Defamation Law Cannot be Transplanted Wholesale to All Other Torts Especially Those for Which Falsehood is Not an Element

It is clear that the actual malice test announced in New York Times Co. v. Sullivan and reaffirmed in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), was the product of the balance between "the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury," id. at 342, only for defamation cases. Justice Powell's opening remarks in Gertz emphasize the context in which the constitutional privilege was being evaluated:

> This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen

(Emphasis added). (Citation omitted).

The actual malice test of New York Times Co. v. Sullivan is appropriate for claims sounding in defamation which

involve false statements of fact,[25] and for a privacy violation asserting a "false light" claim, e.g., Time v. Hill, 385 U.S. 374 (1967).

The different constitutional balance required for other torts was further emphasized by this Court in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), where the Court carefully distinguished a "false light" privacy claim from a publicity claim. Id. at 573. Justice White explained that "the protection extended to the press by the First Amendment in defamation cases" does not necessarily apply to violation of other state-created torts, such as the right of publicity. Id. at 574.

The television station in Zacchini faithfully broadcast plaintiff's entire "human cannonball" act on its evening news program, which lasted approximately 15 seconds, without any

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25 Even in defamation cases, blind application of the actual malice test may not be appropriate, for example, in the area of works of fiction. See, e.g., Bindrim v. Mitchell, 92 Cal. App.3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979); Pring v. Penthouse International, Ltd., 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); Miss America Pageant, Inc. v. Penthouse International, Ltd., 524 F. Supp. 1280, 1283-84 (D.N.J. 1981) ("While such a test is easily applied to news items intended to convey truthful information, it is less clear how the Supreme Court would evaluate a work not intended to be truthful. It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a falsity, since such works are not intended to convey truth.") Moreover, the Gertz balance does not necessarily obtain in a defamation action where the statement does not involve an issue of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985).

alteration or distortion, and with favorable commentary. This Court's analysis contrasted the interests protected in a defamation or "false light" privacy claim with the state's concern "in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." Id. at 573. In Zacchini, this Court concluded that while a state "may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so." Id. at 578-79. Thus, this Court held that the Constitution does not forbid liability under the facts of Zacchini, which clearly involved freedom of the press in the form of a news broadcast, even though there was no falsehood involved.[26]

Upholding Hugo Zacchini's publicity claim, moreover, would not "represent a species of liability without fault" because the news station "knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film." Id. at 578. Thus, the intentionality that is part of the tort of commercial appropriation, which does not violate the Constitution, has nothing at all to do with "falsity" because the broadcast in Zacchini was truthful and accurate and did not communicate false statements of fact.

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[26] Similarly, this Court noted that freedom of speech does not protect the broadcast of a copyrighted work, id. at 575, even though no falsehoods are involved there either.

In Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975), this Court recognized that while truth is a constitutionally required defense to a defamation action brought by a public figure, truth does not preclude a claim based upon Georgia's "tort of public disclosure." Id. at 489-90. In that case, the Court decided the narrow question that the state cannot create a cause of action for the accurate publication of the name of a rape victim obtained from judicial records maintained in connection with a public prosecution and open to public inspection. Id. at 491.

The balance in that case was struck in favor of "the public interest in a vigorous press" because "the interests in privacy fade when the information involved already appears on the public record." Id. at 494-95. However, the Court implied that a different result might obtain if the published disclosure of private facts did not have its source in a public record. And for a plaintiff to recover punitive damages in such a case, the actual malice required to be proven would surely not be subjective awareness of "falsity" since "falsity" is not an element of the tort.

This Court in Cox cited with approval the four branches of privacy catalogued in the Restatement and suggested by Dean Prosser. Id. at 493-94 and n.22. These include unreasonable intrusion upon seclusion, appropriation of name or likeness, unreasonable publicity given to private life and "false light" publicity. As to appropriation of name and

likeness, this Court in Time v. Hill, 385 U.S. 374 (1967), indicated that such a use for advertising or to promote the sale of goods would have to be treated differently than a "false light" privacy claim:

> An application of that limited scope would present different questions of violation of the constitutional protections for speech and press.

Id. at 381.

Under the New York privacy statute involved in that case, §§50-51 of the New York Civil Rights Law, punitive damages may be awarded for a "knowing" use. The tort of commercial appropriation for advertising use does not involve "falsity," and punitive damages would therefore be constitutionally permissible without proof of subjective awareness of "falsity." Indeed, in that case this Court virtually approved the tort of outrageous conduct, recognizing "an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.'" Id. at 383 n.7, quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940).

The Ninth Circuit in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), upheld the tort of wrongful intrusion as a branch of invasion of privacy. In its evaluation of

constitutional considerations, the Court of Appeals concluded that: "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." Id. at 249. The court rejected the argument that New York Times Co. v. Sullivan insulates defendants from liability, emphasizing that the tort of intrusive conduct is not governed by the same considerations applicable to defamation law. Id. at 249-50. If punitive damages were involved in that case upon proof of actual malice, the appropriate standard would have nothing to do with "falsity" because the private facts surreptitiously obtained by subterfuge were all true.

This Court has "long recognized that not all speech is of equal First Amendment importance." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593, 602 (1985). Thus, certain kinds of speech may be accorded no protection at all, e.g., obscenity and "fighting words," whereas other kinds of speech may qualify for only reduced protection, e.g., commercial speech, and yet other kinds of speech may be strictly regulated, e.g., proxy solicitations. Id., 86 L.Ed.2d at 602 n.5.

Accordingly, the actual malice test of defamation law, involving a defendant's subjective awareness of "falsity" or reckless disregard for the "truth," cannot be engrafted upon and indiscriminately applied to all state-created torts, such as privacy or emotional distress. In this case, therefore,

the Court should engage in the same careful balancing process that has characterized all of its prior decisions where constitutional defenses have been raised.

C. The Substantial State Interest in the Prevention of the Intentional Infliction of Emotional Distress Outweighs Whatever Dubious Value Defendants' Outrageous Publication May Possess

If this Court recognizes, as plaintiff contends, that the article is nothing more than a series of false statements of fact knowingly made by the defendants for the purposes of inflicting emotional distress upon plaintiff and assassinating his integrity, then the verdict should be upheld because it has repeatedly been stated that there is no constitutional value to such speech. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

However, if the Court concludes that defendants' publication does not amount to calculated "falsehood," then the defendants' right to use speech in this extreme and outrageous manner must be weighed against the countervailing state interest in preventing the intentional infliction of emotional distress.

This Court has long recognized that individual freedom must sometimes be subordinated to protect compelling state interests necessary for an orderly society. The state interest

which is protected by the law of intentional infliction of emotional distress is one such compelling state interest.

> Neither the First Amendment nor the Fourteenth constitutes an absolute bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," are permissible "when they have been found justified by subordinating valid governmental interests." The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights.

NAACP V. Button, 371 U.S. 415, 453 (1963) (Harlan, J., dissenting).

Here, the problem is to weigh the interest the defendants have in the extreme and outrageous manner in which they vented their hatred of Reverend Falwell against the substantial state interests that exist in the protection of individuals from extreme emotional distress and from the abuse of their dignity and personalities. Justice Stewart in his concurrence in Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1966), explained that the Ninth and Tenth Amendments to the Constitution preserve the fundamental right of every human being to be free from speech so oppressive as to exceed all possible bounds of decency:

> The right of a man to the protection of his own reputation from unjustified invasion

> and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Moreover, he emphatically observed that there are limits to the vehemence and venom which the Constitution permits in free debate:

> We use misleading euphemisms when we speak of the New York Times rule as involving "uninhibited, robust, and wide-open" debate, or "vehement, caustic, and sometimes unpleasantly sharp" criticism. What the New York Times rule ultimately protects is defamatory falsehood.

See Chaplinsky v. New Hampshire, 315 U.S. 568 (1941), where opinions were held actionable because outrageously stated in the form of "fighting words."

For example, it is inconceivable that this Court would find that liability for the type of vehement speech found in Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985), is constitutionally impermissible. The misconduct proven in the Raftery case is directly analogous to the misconduct proven in this case because it involved only the communication of venomous opinions with evil intent, and did not result in any physical injury.

In Raftery, plaintiff sued his ex-wife, who had absconded with their son while the divorce decree which granted

plaintiff visitation rights was still pending. Plaintiff searched for four years to discover the whereabouts of his son, with whom he wished to continue a parental relationship. However, when he finally was able to contact his son, he found that his ex-wife had so poisoned the child with her venomous opinions, that he could not re-establish a relationship. He then sued his ex-wife, not for alienation of affection or libel, but for the intentional infliction of emotional distress.

Like the defendants in this case, the ex-wife in Raftery argued that the claim of emotional distress was barred because the defendant was doing indirectly what he could not do directly, namely, asserting a claim of alienation of affection. However, the Fourth Circuit rejected this reasoning, pointing out that each of these torts protected separate state interests. Thus, while the tort of alienation of affection involves relational injury, the tort of emotional distress involves more subjective issues of self-image.

The distinction drawn by the Fourth Circuit in Raftery between the narrow subjective state interest protected by the tort of emotional distress and the "relational interests" protected by the tort of alienation of affection is the same distinction that separates plaintiff's libel claim from his claim of emotional distress in this lawsuit. It is these interests which are protected by the Ninth and Tenth Amendments, and it is against these very real, personal

interests that defendants' claimed right to freely publish the Falwell Campari ad in the extremely abusive and outrageous manner they did must be weighed.[27]

In the analogous case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1941), this Court ruled that a person's interest in presenting his opinions in an outrageous and obscene manner was not outweighed by the state's interest in order and morality because the manner of such expression added only slightly, if anything, to the search for truth.

In that case, the defendant was distributing literature of his religious sect in the streets of Rochester. He addressed a local marshall with the following words: you are "'a God damned racketeer,' and 'a damned Facist and the whole government of Rochester are Fascists or agents of Fascists.'" 315 U.S. at 569. Chaplinsky was subsequently charged and convicted of violating a New Hampshire statute which outlawed what was then viewed as an outrageous mode of speech. This Court upheld the conviction:

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never

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[27] The different state interests protected by the law of defamation and the independent tort of intentional infliction of emotional distress are discussed in Point III at pp. 48-54, infra.

> been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Cantwell v. Connecticut, 310 US 296, 309, 310, 84 L ed 1213, 1221, 60 S Ct 900, 128 ALR 1352.

315 U.S. at 571-72.

The statute in Chaplinsky was found not to violate the Constitution because it did not regulate the substance of the defendants' opinion, merely the manner in which it was conveyed. In Chaplinsky, this Court weighed defendants' interest in the manner of his expression, the public's interest in the free flow of opinions and the state's "social interest in order and morality," and concluded that the state interest outweighed any First Amendment rights defendant may have had in expressing his opinions in the way he did. Times may have changed, and manners of expression may have changed with them, but defendants' conduct in this case is still an outrage to the concept of any orderly and decent society. Just as the First Amendment interest in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593, 602 (1985), was "less important than the one weighed in Gertz," here too there is little or no social value in the outrageous statement

published, not as a legitimate parody, but with the specific design and intention to inflict serious emotional distress.

D. The Balance of Interests Permits a Finding of Liability Upon Proof of Culpable, Intentional Misconduct

The product of the balance of the state's interest in protecting its citizens from the intentional infliction of emotional distress and the right of free speech is a test which permits liability for outrageous conduct which has only a slight social value and which is expressed in a culpable, intentional manner offensive to First Amendment principles.

If such a test for the emotional distress tort is to parallel the actual malice standard of defamation law, then it should focus upon the "mens rea" of the publisher rather than the "falsity" of the statement published. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 515, 516 (1984) (Rehnquist, C.J., dissenting). See also Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) ("Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds."); Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution, 23 Washburn L.J. 24, 52 and n.146 (1983) ("the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), is, by nature, a scienter requirement.").

The Court of Appeals reached this same conclusion: "Properly read, New York Times focuses on culpability. The emphasis of the actual malice standard is 'knowing . . . or

reckless.'" 797 F.2d at 1275. The Court of Appeals, therefore, concluded that the First Amendment protection is satisfied by the requirement under Virginia law that "the defendant's misconduct be intentional or reckless." Id. Thus, "[t]he first amendment will not shield intentional or reckless misconduct resulting in damages to reputation, and neither will it shield such misconduct which results in severe emotional distress." Id.[28]

That the First Amendment test of culpability may coincide with intentional conduct already required under Virginia state law for the intentional infliction of emotional distress is no reason to reject such a test in the circumstances of this tort action. Depending on the kind of speech involved and the interests to be protected, "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ____, 106 S. Ct. 1558, 89 L.Ed.2d 783, 792 (1986).

Defendants challenge this test on the ground that "the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to

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[28] If plaintiff prevailed upon only a negligence theory, that might be insufficient to satisfy the constitutional standard. But Virginia does not recognize the tort of negligent infliction of emotional distress, but only the intentional infliction of such harm, so that in this case the constitutional threshold has been satisfied.

harm by publishing a falsehood about the public figure." (Defendants' brief, p. 12). This argument is misplaced because it again seeks to engraft wholesale a rule devised within the strict confines of defamation law rather than in the context of an action based upon the intentional infliction of emotional distress.

The differences between the element of libel and emotional distress are crucial to this analysis because intent to cause injury is not even an element of a defamation claim, while it is the gravamen of a claim for the intentional infliction of emotional distress. Thus, in balancing the state interests involved in a defamation case, the intent to cause injury would not weigh heavily because neither the resultant reputational harm nor the public good protected is in any way affected by the speaker's purpose. In contrast, where the tort involved is the intentional infliction of emotional distress, the essential state interest in protecting its citizens from such intentional,
calculated misconduct is directly advanced by focusing on the speaker's motives. In short, the culpability standard focuses upon motive in an action for the intentional infliction of emotional distress because motive is essential to that tort, whereas in defamation falsity rather than motive is the essential element.

E. The Constitutional Standard Was Satisfied in This Case

The culpable misconduct of the defendants amply satisfies the constitutional protection afforded by the First Amendment. The district court charged the jury that in order for plaintiff to prevail on his emotional distress claim, he must prove, inter alia, that defendants' conduct was "intentional or reckless," which is satisfied where the wrongdoer "had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result." [29]

Although the jury was asked to make this finding by a preponderance of the evidence, even if a higher burden of proof is required, the court can appropriately determine whether the constitutional standard has been met. Cf. Time, Inc. v. Firestone, 424 U.S. 448, 462 (1974). In denying defendants' motion for judgment notwithstanding the verdict, the district court found that Flynt made his "specific purpose" of inflicting emotional distress upon Reverend Falwell "abundantly clear" and admitted "his own culpable intent." [30] The Fourth Circuit likewise acknowledged the compelling evidence of Flynt's intent to harm Reverend Falwell and the specific desire of causing him emotional distress. 797 F.2d at 1273, 1275, 1276.

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[29] J.A. at _____ [Joint Appendix on Appeal 1490].

[30] J.A. at _____ [Joint Appendix on Appeal 700-01].

At trial, defendants presented the testimony of several Hustler editors in order to vitiate the condemning admissions of Larry Flynt. Hustler senior editor Bruce Helford testified through deposition that he wrote most of the Falwell Campari ad and brought the copy directly to Larry Flynt in order to "expedite matters," thus bypassing the editorial director Kelly Garrett,[31] who also testified briefly at trial. Helford also confirmed that Larry Flynt reviewed and approved the Falwell Campari ad and initialed the copy.[32] The only other Hustler editor to testify at trial was Richard Warren Lewis, who conceded that at the time of the publication of the Falwell Campari ad in the November 1983 issue of Hustler Magazine, he had no editorial responsibility for the contents of the magazine because he first assumed such duties in April 1984.[33] In fact, Mr. Lewis had not even seen the copy for the Falwell Campari ad until after it appeared in Hustler Magazine.[34]

In stark contrast to the limited authority of the Hustler editorial staff, Larry Flynt, the editor and publisher

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31 Helford testimony, J.A. at _____ [Joint Appendix on Appeal 1407].

32 Id., J.A. at _____ [Joint Appendix on Appeal 1408]; Plaintiff's Exhibit 6, J.A. at _____ [Joint Appendix on Appeal 1822].

33 Lewis testimony, J.A. at _____ [Joint Appendix on Appeal 981].

34 Id., J.A. at _____ [Joint Appendix on Appeal 996-97].

of Hustler Magazine, approved all of the contents of the publication, and specifically approved "every single word" of the Falwell Campari ad.[35]

Larry Flynt, the publisher with ultimate responsibility for the contents Hustler Magazine, testified that he did not intend the offensive publication to be a parody but instead the publication of the truth,[36] even though he had nothing to support his wild fabrications. But he wanted to "settle a score" with Reverend Falwell,[37] to upset him,[38] to hurt him,[39] and to "assassinate" his integrity.[40] As to the resultant harm from this vicious personal attack, Flynt "didn't care then, and don't care now."[41] Accordingly, there was ample evidence of culpable conduct on the part of both the individual and corporate publisher of Hustler Magazine sufficient to meet the constitutional standard. See also Statement of the Case, pp. 4-6, supra.

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[35] Flynt testimony, J.A. at _____ [Joint Appendix on Appeal 868-69, 875].

[36] Id., J.A. at _____ [Joint Appendix on Appeal 887, 900, 907].

[37] Id., J.A. at _____ [Joint Appendix on Appeal 885].

[38] Id., J.A. at _____ [Joint Appendix on Appeal 898].

[39] Id., J.A. at _____ [Joint Appendix on Appeal 907].

[40] Id., J.A. at _____ [Joint Appendix on Appeal 902].

[41] Id., J.A. at _____ [Joint Appendix on Appeal 878].

Defendants sought to avoid this compelling evidence by the exclusion of Flynt's deposition on the ground that he was "crazy" at the time. Defendants' Brief p.5 n.13.[42] At early common law, a charge of mental incapacity, if proven, could be used to challenge a witness' competency to testify. However, under the modern view, such a challenge merely goes to the weight of the evidence. Thus, under the Federal Rules of Evidence, even a person who suffers from an obvious mental deficiency will be required to testify unless it is shown that his testimony suffers from some other infirmity such as relevancy. 3 J. Weinstein, Weinstein's Evidence §607[4] at pp. 607-44 (1982). Rule 601 of the Federal Rules of Evidence, entitled "General Rule of Competency," provides in relevant part: "Every person is competent to be a witness except as otherwise provided in these rules." (Emphasis added).

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42 Defendants' presumptuous contention that the Court of Appeals failed to conduct a de novo review of the evidence is misplaced. Moreover, the decision in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1985), requires de novo review of actual malice only rather than "the ultimate judgment itself," so that "it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual malice question. . . ." Id. at 514 n.31. The question of the admissibility or exclusion of the Larry Flynt deposition testimony was therefore not a subject for de novo review. Furthermore, independent review of the actual malice proof does not implicate considerations of demeanor and credibility. Id. Nevertheless, given the admissibility of Flynt's deposition testimony, the record therefore contains clear and convincing evidence of defendants' culpable conduct.

The Advisory Committee's Note to Rule 601 states in relevant part as follows:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.

(Emphasis added) (citations omitted).

In a subsequent section of his treatise on the Federal rules of Evidence, entitled "Mental Incapacity," Judge Weinstein states that: "in cases in which attorneys formerly argued that a witness should not be heard now are illustrative of situations in which the jury will be urged not to believe the witness." 3 J. Weinstein, Weinstein's Evidence, par. 607[4] at pp. 607-44. Accord, United States v. Linstrom, 698 F.2d 1154, 1162 (11th Cir. 1983).

Although Flynt's behavior at his deposition was at times bizarre, the fact that a witness cunningly feigns incompetence and turns his lucidity on and off like a faucet hardly renders his testimony inadmissible. The receipt into evidence of excerpts from Flynt's deposition was well within the exercise of the district court's sound discretion.

Moreover, Flynt's deposition antics are especially suspect because both before and after the June 15, 1984

deposition he gave in this case, Flynt was adjudicated competent by other federal courts despite similar challenges.

On January 30, 1984, Judge Consuelo Marshall found Flynt competent to stand trial in a criminal prosecution, United States v. Flynt, CR-83-979-CBM (C.D. Calif. 1984).[43] And on June 26, 1984, only a few days after his deposition was given in this case, United States Magistrate Jean Dwyer likewise adjudicated Flynt competent to stand trial and even to conduct his own defense in the prosecution arising out of his intemperate and profane outburst before this Court in November 1983. United States v. Flynt, CR. 83-0582 (D.D.C. 1984).[44] Significantly, Magistrate Dwyer rejected the testimony of Flynt's expert psychiatrist who had occasion to observe him on the day after he was deposed.[45]

At Flynt's competency hearing before Magistrate Dwyer, only eleven days after his deposition in this case, Magistrate Dwyer's observation of Flynt's cross-examination of his own psychiatrist (Dr. Neil Goldman) prompted her to comment: "You have done an excellent job so far. I am impressed by your ability to maintain this examination."[46]

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[43] J.A. at ____ [Joint Appendix on Appeal 345].

[44] J.A. at ____ [Joint Appendix on Appeal 279, 328].

[45] J.A. at ____ [Joint Appendix on Appeal 387-88].

[46] J.A. at ____ [Joint Appendix on Appeal 303].

After considering all of the testimony offered, Magistrate Dwyer ruled as follows:

> Counsel, I have during the last hour given this matter a very great deal of thought. I have reviewed the records which have been provided me, not only the psychiatric reports but of various hearings.
>
> We start off with the proposition that anyone who appears before the Court is presumed to be sane and competent and that there must be clear and convincing evidence in my view to overcome that presumption.
>
> With all respect to Dr. Goldman, my observation of Mr. Flynt himself, other psychiatric reports which have been provided me, lead me to the conclusion that Mr. Flynt is in fact competent and able to assist counsel in his own defense or to conduct his own defense. The Court so rules.[47]

Flynt's remarkable performance before Magistrate Dwyer, which took place only a few days after his deposition was taken in this case, clearly indicates that his antics at the deposition were a carefully orchestrated performance, and that at the time he gave his deposition he was perfectly capable of understanding the implications of his conduct.[48]

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[47] J.A. at _____ [Joint Appendix on Appeal 328].

[48] Further illustrating the ruse defendants devised to exclude the Flynt deposition is the fact that Flynt's pre-trial motion to suppress his deposition testimony was supported by the affidavit of the same Dr. Goldman, who stated in support of his conclusions that he had examined Flynt "[o]n June 16, 1984, the day after Larry Flynt's deposition in this matter." J.A. at _____ [Joint Appendix on Appeal 386-90]. Yet neither Dr. Goldman nor Flynt's lawyers disclosed to the district court that on June 26, 1984, Magistrate Dwyer totally rejected his conclusions after hearing Dr. Goldman's live testimony and reviewing the reports of other psychiatrists who had the opportunity to observe Flynt at greater length.

Finally, as recently as September 1985, excerpts from the same Flynt deposition were received in evidence in an unrelated case. Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313, 320 (S.D.N.Y.), rev'd on other grounds, 800 F.2d 298 (2d Cir. 1986). The Flynt deposition testimony was therefore properly admitted, and provided clear and convincing proof of defendants' culpable conduct. As the district court noted, stronger proof could hardly be envisioned, for "[r]are indeed is the case where an individual defendant so readily admits his own culpable intent."[49]

II.

THE OPINION DOCTRINE DOES NOT BAR PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. The Opinion Doctrine is Limited to Defamation Cases

Opinion is not a defense to an action arising out of the intentional infliction of emotional distress. The genesis of the opinion doctrine, both at common law and as a constitutional question, has been in the context of defamation actions. There is no common law or constitutional defense of opinion to an action for the intentional infliction of emotional distress.

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[49] J.A. at _____ [Joint Appendix on Appeal 701].

Although this Court's opinions in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), and Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 745 (1974), have been interpreted as recognizing an "absolute privilege" for expressions of opinion in the context of a defamation action, this Court has never directly stated the existence of such a doctrine nor expanded the scope of its applicability.

These three decisions are all defamation cases. Thus, while it is an open question whether the doctrine of opinion has been elevated to the level of a constitutional imperative, there presently is no common law or constitutional authority for extending the opinion doctrine beyond defamation law to the intentional infliction of emotional distress.

Defendants' contention that the opinion doctrine must be applied to all speech-related conduct is undermined by this Court's decision in Chaplinsky v. New Hampshire, 315 U.S. 569 (1941), which upheld a criminal conviction for the outrageous manner in which the defendant expressed his opinion. The continuing viability of Chaplinsky has been repeatedly recognized by this Court, strongly suggesting that the opinion doctrine will not be applied as a matter of constitutional law to areas involving speech-related misconduct other than defamation.

A review of the Restatement (Second) of Torts §§46-62 demonstrates that the common law does not recognize "opinion" as a defense to the tort of intentional infliction of emotional distress. Thus, even though the Restatement expressly recognizes that the tort of intentional infliction of emotional distress is subject to the restrictions of the First Amendment (see, e.g., Restatement (Second) of Torts §566, Comment f), it does not list the "opinion" privilege as a constitutional defense. This is not surprising because a false statement of fact is not an element of the tort of intentional infliction of emotional distress, and the opinion doctrine does no more than distinguish factual statements from other kinds of speech. There is, therefore, no function to be performed by the opinion doctrine in connection with the tort of the intentional infliction of emotional distress.

By contrast, opinion is directly relevant to a libel claim, where the opinion doctrine may be used to challenge the element of the tort which requires proof that the offending statement be a false statement of fact. Clearly, if the statement is opinion and not fact, an essential element of the tort of defamation cannot be proven.

B. Absolute Protection for Opinion Is Not Necessary in Non-Defamation Cases

Defendants' argument that "opinion and rhetorical hyperbole constitute protected speech under the First Amendment and cannot give rise to civil liability" is a novel and

potentially revolutionary concept which is totally unsupported by any rulings of this Court.[50] Although substantial support does exist for the proposition that there is a constitutional privilege for the expression of opinion in a defamation case, this Court has never suggested that the opinion doctrine applies beyond the law of defamation. Furthermore, there is no reason to believe that the adoption of such an absolute wholesale privilege would in any way enhance the vigor of debate in this nation.

In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593, 611 (1985), Justice White had "come to doubt the easy assumption that the common-law rules would muzzle the press." Indeed, Justice White correctly observed that "it is difficult to argue that the United States did not have a free and vigorous press before the rule in New York Times was announced." Id.

That the press would still remain free, undeterred and vigorous without the opinion rule is supported by the illustrations of political humor and satire mentioned in

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[50] Justice Scalia has noted the unnecessarily expansive constitutional "evolution" concerning the opinion analysis: "Existing doctrine provides ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist." Ollman v. Evans, supra, 750 F.2d at 1036. The elevated standard of culpable, intentional conduct provides enough defenses without carving out an area of absolute privilege applicable to tort law generally. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed. 593, 608 (1985) (White, J., concurring).

defendants' own brief and catalogued in the briefs of the amicus curiae -- many of those illustrations predate the New York Times rule by centuries. If the common law of defamation and intentional infliction of emotional distress did not stifle the long tradition of caustic political debate during the last two hundred years, then it will not stifle it now. The only reason defendants must advocate an absolute rule is because their extreme and outrageous conduct has gone far beyond even the broad limits of free speech and robust debate.

Unfortunately, pushing the law beyond its outer limits is exactly what Larry Flynt seeks to achieve in this case. He "unequivocably" believes that "free expression is absolute" and he can therefore publish with ever escalating outrageousness anything he wants about a person's private sexual activities, whether real or fanciful and no matter how horrible it may be.[51] But Flynt's brand of free expression exceeds what may be legitimately published about even a public figure. As Justice Stevens stated in his dissent in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. ___, 106 S.Ct. 1558, 89 L.Ed.2d 783, 798 (1986): "In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution."

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[51] Flynt testimony, J.A. at _____ [Joint Appendix on Appeal 891-93].

C. The Opinion Doctrine Is Inapplicable Because the Falwell Campari Ad Asserts False Statements of Fact

Perhaps the greatest misapprehension which repeatedly surfaces as the principal theme of defendants' brief is their contention that the jury expressly found that the Falwell Campari ad did not assert a false statement of fact. From this crucial misconception flows all of the defendants' arguments, i.e., that if the publication does not constitute a false statement of fact it must therefore be rhetorical hyperbole or opinion which enjoys absolute constitutional protection; and since actual malice is defined as subjective awareness of falsity or reckless disregard for the truth, the absence of a false statement of fact precludes a finding of actual malice.

This argument completely misunderstands what the jury actually found in responding to the first interrogatory of the Special Verdict Form.[52] The jury merely found that the Falwell Campari ad could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated." While this determination might arguably relate to defamation by the use of indirect statements of fact[53] or the extent of damages suffered by plaintiff as a result of the circulation of the offensive publication, it does not state that the Campari ad was not a statement of fact.

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[52] J.A. _____ [Joint Appendix on Appeal 540].

[53] Restatement (Second) Torts §565, Comment b, Illustration 1 (1977).

The Falwell Campari ad accuses Reverend Falwell of committing incest with his mother in an outhouse outside Lynchburg, Virginia, being drunk at the time, seeking to repeat the incestuous encounter "lots of times," and always being in a state of intoxication when he preaches from the pulpit.[54] Grammatically and semantically, these accusations constitute declarative statements of fact. The veracity of the accusations may easily be disproved at trial because the offensive publication "undoubtedly admits of a sufficiently ascertainable stable core of meaning." Ollman v. Evans, 750 F.2d 970, 1033 (D.C. Cir. 1984) (Wald, J., dissenting in part), cert. denied, ___ U.S. ___, 105 S.Ct. 2662, 86 L.Ed.2d 270 (1985). Whether readers believe the accusations may, of course, relate to the issue of damages, but has absolutely nothing to do with categorizing the statements themselves as fact or opinion.[55]

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[54] Plaintiff's Exhibit 1, J.A. _____ [Joint Appendix on Appeal 1503].

[55] The determination of whether a particular statement is fact or opinion presents a question of law for the court to decide. Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985); Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), cert. denied, ____ U.S. ____, 105 S. Ct. 2662, 86 L.Ed.2d 278 (1985). Accordingly, the question never should have been presented to the jury. The district court correctly charged the jury that "in order to be libelous there must be a false statement asserting facts about the plaintiff. If there is no representation of fact then there is no actionable libel." J.A. _____ [Joint Appendix on Appeal 1486]. While this instruction was essentially correct, interrogatory 1 of the Special Verdict Form was unnecessary. The jury should have been simply asked whether the plaintiff proved libel by a preponderance of the evidence.

The jury's answer to the special interrogatory focuses upon the perception of readers but not upon whether or not the publication asserts false statements of fact. This distinction is illustrated by the statement "gravity causes objects to fall toward the sky." While this statement could not "reasonably be understood as describing actual facts" or "actual events," there is no doubt that the statement makes a false assertion of fact. Thus, the question of "belief" of the statement does not advance the analysis of whether the statement is one of fact or opinion.

Once it is recognized that the Falwell Campari ad plainly communicates factual statements rather than pure "ideas," the opinion doctrine cannot insulate it from liability. Moreover, the evidence of actual malice is overwhelming and unrefuted, Flynt testified that he had information concerning Reverend Falwell's alleged incest with his mother, supported by documentary proof, personal affidavits by eyewitnesses and tape recordings,[56] but none of this evidence was forthcoming during discovery or trial because Flynt just made it up. Flynt's utterly reckless fabrication of false statements of fact amply support a finding of actual malice. St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968).

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[56] Flynt testimony, J.A. at _____ [Joint Appendix on Appeal 871, 879, 880-84, 892, 895-96].

D. The Opinion Doctrine Is Inapplicable Because There Is no Rational Relationship Between the Opinion Allegedly Expressed in the Publication and the Manner of Expression

Defendants' contention that the article they published about Reverend Falwell was simply a joke, "a humorous social and political comment" which should be tolerated because some degree of abuse is necessary to a free press misses the point completely. The jury did not impose liability against the defendants in this case because they were funny, caustic or incidentally abusive, but because their conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Prosser, Insult and Outrage, 44 Cal. L. Rev. 40, 44 (1956).

Thus, although "some degree" of abuse may be the inevitable byproduct of vigorous social or political debate, when the calculated purpose of speech is abuse and the abuse is not merely incidental to the speech, then the publisher has stepped beyond that degree of expression which is tolerated by the Constitution. Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593, 602 (1985). Even cartoon portraits of public figures, Ali v. Playgirl, Inc., 447 F. Supp. 723, 727, 278 n.9 (S.D.N.Y. 1978), or humorous photographic caricatures, Burton v. Crowell Pub. Co., 82 F.2d 154 (2d Cir. 1936), can give rise to liability without violating the First Amendment when they serve no social

purpose and convey no political or newsworthy message, but merely ridicule the subject in an outrageous fashion.

Here, the misconduct alleged is not that defendants called Reverend Falwell a hypocrite, as they now claim, but the intolerable manner in which they allegedly tried to make that point. Just as the defendant in Chaplinsky v. New Hampshire, supra, was called to account for the extreme and outrageous manner in which he expressed his opinion, defendants too should be held responsible for the injuries Reverend Falwell suffered because of the extreme and outrageous manner in which they expressed their so-called opinion of him.

The fact that defendants' offensive publication was intended to be "humorous" does not relieve them of liability nor does it make their conduct any less outrageous to society. Significantly, the tort of intentional infliction of emotional distress was born out of extreme and abusive speech intended as a practical joke. E.g., Wilkinson v. Downton, 2 Q.B.D. 57 (1897); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Great A & P Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1930).

At some level of abstraction, all factual accusations, no matter how extreme or outrageous, could be deemed statements of opinion couched in an allegorical fashion. However, the Court should scrutinize the bona fides of the claim of parody to determine whether the acts depicted in the allegory are rationally related to the conduct being criticized. The

element of outrage in the tort of intentional infliction of emotional distress implicitly recognizes that almost any form of social intercourse if pushed to irrational limits may become unreasonably abusive.

As the facts of this case amply illustrate, satire is no exception to the general rule that in the hand of man anything may become a weapon and even art may be used to do violence. It would be surprising if human ingenuity could not devise some devilish corruption of the art of satire and parody so that its use in that corrupt form became socially intolerable.

The defendants' contention that the Falwell Campari ad was somehow intended to portray Reverend Falwell as a hypocrite is highly suspect. Defendants do not claim he is a sexual hypocrite, i.e., they do not contend they ever believed he had committed any kind of sexual transgression and certainly not the conduct attributed to him in their publication. If defendants did not intend to portray him as a sexual hypocrite in the Falwell Campari ad it is difficult to understand the nature of the conduct they are allegedly lampooning.

Clearly, any accusation of loathesome, bestial behavior could be construed, at some extraordinary level of abstraction, to mean that the person so accused is being satirized. But if the loathesome conduct depicted is not related to the actual conduct of the person being criticized,

society has a right to declare that comparison "outrageous." Were the states not allowed to prohibit such intentional, outrageous conduct, the defense of opinion would swallow whole the carefully balanced rights still remaining to victims of speech-related abuse.

E. The Statements Made in the Publication Do Not Qualify as Opinion Because They Fail to Disclose the Facts on Which the Alleged Opinion is Based

The Falwell Campari ad published by the defendants fails to meet the classic formulation of opinion set forth in the Restatement (Second) Torts §566 upon which the alleged opinion is based.

To the extent that the offensive publication contains evaluations laden with factual content, it represents the kind of "hybrid" statement addressed by Chief Judge Robinson, dissenting in part in Ollman v. Evans, supra, 750 F.2d at 1024:

> Hybrid statements unaccompanied by any predicate facts, or attended by defective recitals of the underlying facts, thus should occupy a very different position in the concerns of libel law, for their claim to First Amendment protection is far less compelling.
>
> * * *
>
> I would hold that a hybrid statement is absolutely privileged as opinion when it is accompanied by a reasonably full and accurate narration of the facts pertinent to the author's conclusion. I would further hold that hybrid statements not so accompanied are not entitled to that degree of protection unless those facts are already known to the author's listeners or readers.

Here, of course, there was no communication of truthful or accurate underlying facts, so whatever opinion was sought to be expressed is beyond constitutional protection.

III.

THE ABSENCE OF AN AWARD FOR REPUTATION DAMAGES DOES NOT PRECLUDE DAMAGES FOR EMOTIONAL DISTRESS

Defendants argue that the same facts which give rise to a defamation claim cannot support a claim for emotional distress, and that the absence of reputation damages forbids an award for emotional distress. This argument is flawed in two respects: first, plaintiff's defamation claim was unsuccessful, so that his recovery for the tort of emotional distress was not a mere "substitute" for a libel claim; second, the jury never reached the question of reputation damages for libel, so that there is no basis for defendants' false assumption that the Falwell Campari ad caused no harm to Reverend Falwell's reputation.

The broad-brush approach that every time a libel claim fails, a companion claim for the intentional infliction of emotional distress necessarily fails with it, must be rejected. Defendants urge this argument without regard to the historical differences between the two torts and without analyzing the discrete interests each protects, i.e., the "reputation" and

"relational" interest in one's good name versus the "personal" interest in avoiding mental distress and humiliation.[57]

Courts have long held that a claim for intentional infliction of emotional distress states a cause of action independent and distinct from both libel and invasion of privacy. See Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evaluation, 23 Washburn L.J. 24, 27 (1983). Thus, where a plaintiff adduces proof sufficient to satisfy each of the rigorous elements of the tort of emotional distress, it is completely immaterial that he may have failed to prove another cause of action also alleged in his complaint. It is quite common that the same conduct gives rise to different legal claims all of which are simultaneously

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A basic distinction between defamation and intentional infliction of emotional distress is that the former provides the remedy for invasion of a "relational" interest while the latter provides a remedy for the invasion of a "subjective," nonsocial interest:

> "[D]efamation is an invasion of the interest in reputation and good name. This is a 'relational' interest [citation omitted], since it involves the opinion which others in the community may have, or tend to have, of the plaintiff. Consequently defamation requires that something be communicated to a third person that may affect that opinion. Derogatory words and insults directed to the plaintiff himself may afford grounds for an action for the intentional infliction of mental suffering, but unless they are communicated to another the action cannot be one for defamation. . . . Defamation is not wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action." Prosser, Law of Torts §111 at 737 (4th ed. 1971).

alleged in a single pleading. Federal Rule of Civil Procedure 8(e)(2); Ross v. Bernhard, 396 U.S. 531 (1970). While such claims may have some overlapping or common characteristics, the theory of the claims needed to establish them and the interests protected often differ. While falsity is an essential feature of a libel claim, it is not an element of claim for the intentional infliction of emotional distress.

The leading appellate case to address this issue upheld the separate existence of these claims. In Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3rd Cir. 1979) (en banc), the Third Circuit sustained a verdict against plaintiff on his libel claim while at the same time it upheld a verdict for him on his claim for intentional infliction of emotional distress. Fitzgerald v. Penthouse International, Ltd., 525 F. Supp. 585 (D. Md. 1981), aff'd in part, rev'd in part, 691 F.2d 666 (4th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), raised the analogous question of whether an interference with contract claim can coexist with a libel claim arising out of the same facts. The Fourth Circuit reversed the dismissal of plaintiff's claim of interference with business relationships because that tort claim was held to have independent legal vitality separate and apart from the libel claim, and failure of the libel claim did not automatically require dismissal of the interference claim. Upon remand, the district court was directed to "reconsider these claims if relief based on plaintiff's cause of action for defamation is denied." 691 F.2d at 672.

In Apostle v. Booth Newspapers, Inc., 572 F. Supp. 897, 905 (W.D. Mich. 1983), plaintiff's sued a newspaper for both defamation and intentional infliction of emotional distress, alleging that the newspaper had falsely implicated their business in a local prostitution ring. Denying the newspaper's motion for summary judgment on the emotional distress claim, the court held that:

> [I]ntentional infliction is recognized as a separate cause of action which does not need to be "parasitic" to a defamation claim:
>
> Intentional infliction of emotional distress deals with invasions of emotional tranquility, while slander [or libel] is based in protoction of reputational interest.
>
> . . . [A] confusion arises because mental suffering is an element of damages in slander, but since the two torts protect different interests, they must be recognized as separate even when based upon the same conduct. (Emphasis added).

See also Braun v. Flynt, 726 F.2d 245, 250 (5th Cir. 1984) (plaintiff entitled to recover actual damages for mental anguish under either defamation or invasion of privacy); Pierson v. News Group Publications, Inc., 549 F. Supp. 635 (S.D. Ga. 1982) (dismissing plaintiff's privacy claim while denying summary judgment on emotional distress claim); Craft v. Rice, 671 S.W.2d 247 (Ky. 1984) (distinguishing between "a slander action which involve[s] damage to reputation and an action for intentional infliction of emotional distress which protect[s] a person's right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquility");

Compos v. General Motors Corp., 71 Mich. App. 23, 26, 246 N.W.2d 352 (1956). See generally Restatement (Second) of Torts, §46, Comment b (although "emotional distress may be an element of damages in many cases when other interests have been invaded, . . . within recent years . . . the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort"). See also, Restatement (Second) of Torts §566, Comment f. ("In the case of ridicule or abuse . . . other tort actions than defamation may be pertinent").[58]

The recent New York case cited by defendants, Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 111 A.D.2d 807, 490 N.Y.S.2d 553 (2d Dep't), aff'd w/o op., 66 N.Y.2d 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297 (1985), involved a letter written by corporate counsel concerning plaintiff's failure to pay an alleged debt. The court dismissed the emotional distress claim because the conduct involved plainly was not "so outrageous in character, and so extreme in degree, as to go beyond all

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58 This line of cases is not contradicted by Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978), rev'd on other grounds, 443 U.S. 111 (1979), where the Seventh Circuit granted summary judgment on all claims because there was no actual malice. The Court of Appeals recognized that constitutional considerations would subject the intentional infliction of emotional anguish tort to an "intent inquiry." 579 F.2d at 1036 n. 16. In a later decision, the Seventh Circuit explained that the absence of an allegation of intentional conduct fails to meet the constitutional standard. Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 274 (7th Cir. 1983).

possible bounds of decency, and to be regarded as outrageous, and utterly intolerable in a civilized community." 490 N.Y.S.2d at 555. The additional comment by the intermediate appellate court, which is quoted by the defendants in their brief, is dicta. The other New York case cited by defendants, Fischer v. Maloney, 43 N.Y.2d 353, 558, 402 N.Y.S.2d 991, 993, 373 N.E.2d 1215 (1978), "questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process." In this case, of course, defendants have created such an outrageous publication so as to avoid the usual recourse afforded by the law of libel. That radical departure from tolerable behavior, however, should not be used as an excuse to insulate them from other applicable tort liability.

The law of Virginia recognizes the tort of intentional infliction of emotional distress as a distinct and independent cause of action. Raftery v. Scott, 756 F.2d 335, 339 n.4 (4th Cir. 1985).[59] Few cases will pass the threshold requirements

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[58] The existence of the tort of emotional distress presents a question of state law. If, for example, California, Flynn v. Higham, 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983), or Oregon, Ault v. Hustler Magazine, Inc., 13 Med. L. Rptr. (BNA) 1657 (D. Ore. Oct. 20, 1986), decide that an emotional distress claim cannot be asserted when the plaintiff has stated a libel claim based upon the same facts, that is a matter of state law. Nothing in those two cases cited by defendants indicates that the dismissal of the emotional distress claim was influenced by constitutional considerations.

for the tort delineated in Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974). Few cases combine the outrageous and intolerable behavior proven here with the deliberate and premeditated intention of the publisher to engage in outright character assassination. There is absolutely no policy reason to extinguish the damages available under this tort in the absence of a successful libel claim. Indeed, the reverse is true, for it is only where a libel claim succeeds and damages for both reputational and emotional harm are recovered, does the separate existence of the emotional distress tort diminish in importance.

IV.

IT IS INAPPROPRIATE TO ASK THIS COURT TO REVIEW PROOF OF DAMAGES

Although defendants prefer to cloak their final argument in the constitutional garb of a "public figure" plaintiff, it is clear under the law of Virginia that for any plaintiff, public or private, to recover damages for this tort he must prove severe emotional distress. Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974). Moreover, the First Amendment provides no additional obstacle to this stringent common law requirement, for even under libel law "anxiety and concern" qualify as "actual injury" and can be recovered witnout proof of reputation damages. Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976).

There is absolutely no authority which requires this Court to review the jury's assessment of damages, which was amply proven at trial. Although Reverend Falwell stated at trial that he is not a person who wears his emotions on his sleeve,[60] it is clear that the publication of the Falwell Campari ad led to one of the very darkest moments of his life. He described it as a "very deep wound of personal anguish and hurt and suffering, such as nothing in my adult life I ever recall before."[61] He testified that the publication damaged his ability to concentrate and to focus on the tasks and responsibilities he had fulfilled for years.[62]

This testimony was corroborated by Dr. Ron Godwin, Executive Vice-President of the Moral Majority, Inc., who stated that Reverend Falwell was visibly hurt by the offensive publication, was often preoccupied afterwards, and had difficulty in focusing on details, particularly the details of administering diverse operations of the Moral Majority.[63] Dr. Godwin further testified that Reverend Falwell's general "enthusiasm and optimism" was visibly diminished after the publication of the ad and that effect of the ad often

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60 Falwell testimony, J.A. ____ [Joint Appendix on Appeal 793-94].

61 Id. at _____ [Joint Appendix on Appeal 806].

62 Id. at _____ [Joint Appendix on Appeal 806-08].

63 Godwin Testimony, J.A. _____ [Joint Appendix on Appeal 941-43, 946].

impaired Reverend Falwell's performance."[64] In view of the fact that this testimony came from one of Reverend Falwell's closest associates, who was in a position to observe Reverend Falwell's daily routine, social behavior and working patterns,[65] there can be no doubt that the jury's finding that the distress was severe was rationally based upon the evidence presented at trial.

In Malandris v. Merrill Lynch, Pierce Fenner & Smith, 703 F.2d 1152 (10th Cir. 1981), cert. denied, 464 U.S. 824 (1983), the Tenth Circuit upheld an award for the intentional infliction of emotional distress in the sum of $2 million, when the claim for the intentional infliction of emotional distress was predicated upon a $30,000 loss resulting from bad investments in stock options. Quoting from Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29, 35 (1943), the Tenth Circuit observed that: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 703 F.2d at 1158. Defendants' suggestion that the case law defines a threshold of pain that a plaintiff must suffer before he can prevail on a claim for intentional infliction of emotional distress is misplaced. No such threshold can be established, and §46 of the Restatement (Second) of Torts, cited by

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64 Id., J.A. _____ [Joint Appendix on Appeal 946].

65 Id., J.A. _____ [Joint Appendix on Appeal 941].

defendants in their brief, envisions no substitute for careful case-by-case analysis:

> Severe emotional distress
>
> * * *
>
> The intensity and duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence that the distress has existed.
>
> It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.

Accord, Paulsen v. Russell, 300 N.W.2d 289, 297 (Iowa 1981). See also Prosser, The Law of Torts §12 at 60 (4th ed. 1971) ("the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required").

Therefore, even though Reverend Falwell testified that his distress continues to this day,[66] it is as important to recognize that the outrageous and completely indefensible character of defendants' publication provides salient evidence of the existence and severity of his distress and suffering.

The damages that flow from emotional distress cannot be quantified or reduced to a scientific formula, and are

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[66] Falwell testimony, J.A. _____ [Joint Appendix on Appeal 793-94].

therefore particularly within the sound discretion of the jury. The cold transcript, of course, cannot provide a substitute for hearing and seeing Reverend Falwell testify at trial, and appreciating firsthand the severe consequences of defendants' profane and insulting publication. It was the jury's task to assess this evidence and to consider the credibility and demeanor of the witnesses. There is nothing in the First Amendment that requires a reviewing court to alter traditional appellate procedure by injecting itself into an evaluation of proof of damages and thereby interfering with the jury process. The Fourth Circuit recognized that reversal is warranted "only when there is a complete absence of facts to support the conclusions reached by the jury." 797 F.2d at 1276, citing Sherril White Construction, Inc. v. South Carolina National Bank, 713 F.2d 1047 (4th Cir. 1983). After reviewing the facts, 797 F.2d at 1276-77, the Court of Appeals correctly concluded that proof of damages was not insufficient as a matter of law.

Conclusion

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE

JEFFREY H. DAICHMAN herby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of Brief for Respondent were mailed postage prepaid First Class mail to the following counsel for petitioners:

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JEFFREY H. DAICHMAN

Sworn to before me this
20th day of July, 1987

Notary Public,
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Qualified in New York County
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RESPONDENT'S

BRIEF

No. 86-1278

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,
Petitioners,

v.

JERRY FALWELL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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Questions Presented for Review.

1. Whether the actual malice test applicable to a public figure defamation case should be applied literally and mechanically to the tort of intentional infliction of emotional distress?

   a. Can Virginia's interest in protecting its citizens from the intentional infliction of emotional distress ever outweigh the First Amendment interest in free expression?

   b. Should the actual malice standard of defamation law, requiring a knowing or reckless "falsehood," automatically and invariably be applied as the constitutional test for all state-created torts, even in those cases where a false statement of fact is not an element of the tort?

   c. Is the First Amendment interest in free speech adequately protected by a test which imposes liability for the intentional, culpable infliction of emotional distress?

   d. Whether under the facts of this case plaintiff has satisfied the constitutional test applicable to the tort of intentional infliction of emotional distress?

2. Whether the defendants' extreme and offensive publication is entitled to absolute constitutional protection simply because they contend it constitutes opinion or rhetorical hyperbole?

   a. Whether, as a matter of law, the accusations of the publication constitute opinion rather than false statements of fact?

b. Should the doctrine of opinion which has been developed as a constitutional defense in defamation actions be applied to the tort of intentional infliction of emotional distress?

c. Is a plaintiff who does not succeed in a libel claim thereby automatically barred under the First Amendment from legal redress for speech which is so intentionally vicious and outrageous and causes such severe emotional distress that it ought not to be tolerated in a civilized society?

3. Whether this Court should independently review plaintiff's proof of damages?

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No. 86-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986.

HUSTLER MAGAZINE, INC., and LARRY C. FLYNT,

Petitioners,

v.

JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT.

Statement of the Case.

Hustler Magazine is a monthly magazine published by both the corporate defendant Hustler Magazine, Inc. and the individual defendant Larry Flynt.[1] This lawsuit arose

[1]Plaintiff's Exhibit 1, Joint Appendix (hereinafter "J.A.") 190.

out of the publication of an offensive and vulgar "interview" of Reverend Jerry Falwell which appeared on the inside front cover of the November 1983 issue of Hustler Magazine. The "interview" was fabricated by the defendants and presented as an "advertisement" for Campari liquor (hereinafter the "Falwell Campari ad").[2]

The Falwell Campari ad published the "interview" in question and answer format and included a genuine photograph of Reverend Falwell. It was entitled "Jerry Falwell talks about his first time," and appropriated the trademark and registered copyright of Campari liquor. In miniscule type at the bottom of the page, the words "ad parody" appeared.

The text of the "interview" accused Falwell of committing incest with his mother in an outhouse in Lynchburg, Virginia, portrayed his mother as being a local prostitute, and charged that Reverend Falwell preaches while intoxicated.

Despite the words "ad parody" in miniscule type at the bottom of the page, the publication was presented as a genuine Campari advertisement. This is established in part by the fact that shortly after the unauthorized publication of the Campari name, copyright and registered trademark, Campari's advertising agency wrote to Larry Flynt on October 7, 1983 concerning this wrongful use of its property as well as resultant embarrassment and damage it caused.[3] That letter was received by Hustler's legal department on October 12, 1983, but was ignored. At trial, Robert Jordan, the chairman of the board of Campari's advertising agency, testified that Campari spent about $3 million in an advertising campaign over a three-

[2]Appendix to Petition for Certiorari (hereinafter "Pet. App.") E.

[3]Plaintiff's Exhibit 9, J.A. 207.

year period, that Hustler misappropriated its copyright and trademark registration without seeking permission or approval, the Falwell Campari ad appeared to be a pirated version of an authentic Campari ad and no response was ever received to the letter of October 12, 1983.[4]

Larry Flynt was personally involved in approving the publication of the Falwell Campari ad. According to the deposition testimony of Hustler's senior editor Bruce Helford, the copy was taken "directly to Larry" in order to "expedite" editorial approval and immediate publication.[5] The Falwell Campari ad was presented to Larry Flynt, who reviewed the text, approved it for publication and personally initialled the copy so that there could be no doubt about its inclusion in the forthcoming edition of Hustler Magazine.[6] In his own profane way, Flynt confirmed that everything published in Hustler Magazine had to have his express approval.[7] Even though the editors and their legal counsel discussed the possibility that Reverend Falwell would bring a lawsuit,[8] they decided to publish the Falwell Campari ad anyway.

Plaintiff filed this lawsuit on or about October 31, 1983,[9] shortly after the November 1983 issue of Hustler Magazine was generally available for sale to the public. At that time, the defendants were placed on notice that plaintiff was seeking substantial monetary damages for invasion of privacy, libel and the intentional infliction of emotional distress.[10] Nevertheless, only a few months later and

[4]Jordan testimony, J.A. 44-52.

[5]Helford testimony, J.A. 171.

[6]Helford testimony, J.A. 171; Flynt testimony, J.A. 99; Plaintiff's Exhibit 6, J.A. 200.

[7]Flynt testimony, J.A. 95, 96.

[8]Garrett testimony, J.A. 89.

[9]Docket Entries, J.A. 1.

[10]Complaint, J.A. 4-12.

during the pendency of this lawsuit, the defendants republished the same offensive publication in the March 1984 issue of Hustler magazine,[11] in which Larry Flynt is listed as "editor."[12]

The publication of the so-called Falwell Campari ad in the November 1983 followed years of vicious attacks against Reverend Falwell within the pages of Hustler Magazine.[13] Yet Reverend Falwell refrained from commencing legal proceedings against what could arguably be characterized as social or political lampoons, however vile and demeaning in nature. But when Flynt published the outrageous accusation of incest involving Reverend Falwell's deceased mother, without any apparent social or political motive or message, Reverend Falwell could no longer tolerate such a personal blow and sought immediate legal redress.

Flynt explained that his true motive was "to settle a score" and "to get even" with Reverend Falwell.[14] He testified that the offensive publication was not even intended to be a parody, but rather was meant to be a truthful publication.[15] As Flynt candidly admitted in the following exchange:

> Q. Mr. Flynt, I take it, then, from what you're telling me, that this publication about Reverend Falwell and Campari was not intended to parody or

[11]Plaintiff's Exhibit 3, J.A. 195, 198.

[12]Plaintiff's Exhibit 3, J.A. 196, 197.

[13]See, e.g., Plaintiff's Exhibit 7, J.A. 202-05; Plaintiff's Exhibit 11, J.A. 209; Plaintiff's Exhibit 12A, J.A. 211; Plaintiff's Exhibit 12B, J.A. 213-16; Plaintiff's Exhibit 13, J.A. 218-20; Plaintiff's Exhibit 14, J.A. 222; Plaintiff's Exhibit 15, J.A. 224; Plaintiff's Exhibit 17, J.A. 226; Plaintiff's Exhibit 18, J.A. 228.

[14]Flynt testimony, J.A. 112-13.

[15]*Id.* at 114, 136.

> exaggerate anything, but to convey the truth. Is that right? A. Yes, sir.[16]

Flynt repeatedly conceded that Hustler's offensive publication about Reverend Falwell was not a parody at all, but was specifically intended to hurt him.[17] Flynt stated that "parody has become so real, we're going to stop doing parody," speaking about his own Hustler Magazine.[18]

With the apparent motive of continuing his attack on Reverend Falwell, Flynt at his deposition insisted that he was "telling the truth" and had as his objective a desire "to upset Reverend Falwell."[19] The following testimony epitomizes his evil animus:

> Q. And didn't it occur to you that . . ., you were attacking a man in his profession? A. Yes.
>
> Q. Did you appreciate, at the time that you wrote "okay", or approved this publication that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that? A. Yeah.
>
> Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could? A. *To assassinate it.*[20]

(Emphasis added).

[16]*Id.* at 140.

[17]*Id.* at 152.

[18]*Id.* at 119. "Parody" is defined as closely imitating another's work for comic effect or ridicule. The Falwell Campari ad imitates and ridicules the literary style and format of the real Campari advertisement, but does not in any way imitate Reverend Falwell's manner or style. While the Falwell Campari ad may be a parody of Campari, it is not a parody of Reverend Falwell. His role in it is merely as an innocent victim.

[19]*Id.* at 136.

[20]*Id.* at 140-41.

Larry Flynt provided this evidence of his real intention to injure Reverend Falwell rather than satirize him, knowing full well that emotional disturbance can be just as devastating as physical suffering.[21]

The case was tried in December 1984 and on December 8, 1984, the jury completed a Special Verdict Form,[22] finding in favor of Reverend Falwell on his emotional distress claim against Flynt and Hustler in the amount of $100,000 compensatory damages, and further assessing punitive damages of $50,000 against Flynt and $50,000 against Hustler. Following the denial of defendants' post-trial motions, final judgment for plaintiff was entered on April 19, 1985.[23]

By answering the district court's first interrogatory on the Special Verdict Form in the negative, the jury declined to find the defendant liable for defamation. The jury merely found that the offensive publication could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated."[24] Petitioners' constitutional argument which appears throughout their brief filed with this Court depends largely upon their mischaracterization of this jury finding as a conclusive determination that the Falwell Campari ad did not constitute publication of a "statement of fact." However, as more fully explained at pp. 33-35, *infra*, the jury made no such finding, and no such finding could be rationally made in view of the specific factual assertions contained in the Falwell Campari ad—instead, the response to interrogatory one was merely a finding that Falwell's reputation had not been damaged. There was no jury finding that the Falwell Campari ad did not assert a

[21] *Id.* at 145.
[22] Pet. App. C at C1-C4.
[23] Pet. App. C at C5-C6.
[24] Pet. App. C at C1.

false statement of fact. Plaintiff did not appeal from the adverse libel verdict because his award for emotional distress vindicated his grievance. Defendants cannot therefore justifiably conclude from the Special Verdict Form that the jury determined that no statements of fact were published about Reverend Falwell.

Summary of Argument.

The "actual malice" standard for defamation of a public figure should not be literally and mechanically applied to all other torts and especially not to those for which a false statement of fact is irrelevant.

The tort of intentional infliction of emotional distress, recognized under Virginia law, serves to protect important state interests—interests which are different from the reputational damage protected by libel law.

The result of this constitutional balancing process is not necessarily the same for every state-created tort. For example, in a public figure defamation case, the test is "actual malice," i.e., subjective knowledge of falsity or reckless disregard for the truth; whereas, in a claim of appropriation of publicity or public disclosure of private facts, the test may be simply the intent to appropriate or to publish. These state-created torts other than defamation do not necessarily involve broadcasting or publishing a "falsehood," so that defendants' insistence upon the literal application of the actual malice test in every instance of speech-related conduct results in a completely unrealistic and unworkable rule of constitutional law, which would automatically bar and ignore other vital state interests deserving protection.

The degree of constitutional protection available to speech-related misconduct depends upon the outcome of a

balancing process between the state interests sought to be protected by the tort involved and First Amendment considerations of free and open debate. This Court has never interpreted the First Amendment as protecting deliberate character assassination or calculated misdeeds.

The test of culpable, intentional conduct identified by the Court of Appeals is appropriate to the tort of intentional infliction of emotional distress. The verdict below satisfies this constitutional requirement because intentionality is the gravamen of the tort of intentional infliction of emotional distress. This constitutional standard of culpability requires a finding that the defendant intended for wrongful purposes to commit such a heinous act that no civilized person should be forced to endure it. This creates a standard so high that few cases can satisfy it.

The doctrine of opinion or rhetorical hyperbole, moreover, does not automatically insulate defendants from liability under the facts of this case. First, the Falwell Campari ad does not represent an opinion. Instead, it makes specific, declarative accusations of purported fact. Second, the opinion doctrine was developed in the area of defamation law and has been confined to that tort. Expanding the doctrine beyond defamation will grant irresponsible publishers an open license to devastate and destroy.

The high threshold of proof required for a case of intentional infliction of emotional distress involves intentional conduct as well as conduct that is so excessive and outrageous as to pass beyond all bounds of what can be tolerated in a civilized society. No absolute form of constitutional protection should be accorded to such barbaric behavior. The right to free speech already enjoys numerous substantive and procedural safeguards to insure the preservation of robust political debate and satire.

Finally, it would be inappropriate for this Court to independently review, as defendants request, the proof of damages which support the jury verdict for intentional infliction of emotional distress. The evidence supporting the damage award satisfied the jury, the district court, and the Court of Appeals; and presents no question of constitutional dimension for this Court to consider.

ARGUMENT

I.

The First Amendment does not require that the jury verdict be set aside in this case

A. The Appropriate Degree Of Constitutional Protection Requires A Balancing Process Rather Than Literal Application Of The Actual Malice Test.

The issue raised by this case was correctly identified by the Court of Appeals: "what form the first amendment protection should take in an action for intentional infliction of emotional distress." 797 F.3d at 1274.

Plaintiff submits that the policies and interests which underlie the protection against intentional infliction of emotional distress must be balanced against those countervailing considerations of free speech and robust debate. It is the result of this balancing process which will determine the appropriate degree of constitutional protection available in this case. Defendants, on the other hand, argue that the "actual malice" test created for purposes of defamation law should be literally and mechanically imposed upon other torts as well. By rigidly applying the standard of "subjective awareness of falsity or reckless disregard for the truth," defendants reach the preordained result they desire to achieve—that since there was no "falsity" in the Falwell Campari ad there can be no actual

malice in the literal sense as that phrase was defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Defendants would eschew the balancing process in order to impose the defamation standard that fulfills their argument that there has not been a "false statement of fact." This argument, however, would automatically bar any redress for speech-related misconduct other than in defamation. However, this Court has never suggested the First Amendment requires such a drastic result. Instead, it has determined the constitutional protection available for specific torts by carefully weighing the state interest and purpose behind the tort alleged against the First Amendment values at stake.

Following *New York Times Co. v. Sullivan*, the next tort case which presented this Court with a direct conflict between state-created tort liability and First Amendment principles was *Time v. Hill*, 385 U.S. 374 (1967). Although the actual malice standard of *New York Times Co. v. Sullivan* was deemed applicable to that "false light" invasion of privacy case, the result was not achieved by "blind application" of the rule, but rather by careful balancing. As Justice Brennan explained in the majority opinion:

> We find applicable here the standard of knowing or reckless falsehood, not through blind application of New York Times Co. v. Sullivan, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times guide our conclusion, we reach that conclusion only by applying

> these principles in this discrete context. *Id.* at 390-91.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499-500 (1975), this Court explained that the constitutional balance depends upon the interests a state is seeking to protect:

> In Gertz we recognized the need to establish a broad rule of general applicability, acknowledging that such an approach necessarily requires treating alike cases that involve differences as well as similarities. Id. at 343-344, 41 L Ed 2d 789. Of course, no rule of law is infinitely elastic. In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance to be struck. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions.

This Court has therefore recognized the danger of indiscriminate adoption of the constitutional protections created for defamation law to other torts. Such "blind application" of constitutionalized libel rules to other torts would create irreconcilable confusion. The Court of Appeals correctly rejected the slavish adherence to literalism urged by the defendants: "While we agree that the same level of protection is due the defendants, we do not believe that the literal application of the actual malice standard which they seek is appropriate in an action for intentional infliction of emotional distress." 797 F.2d at 1274.

B. The Actual Malice Test Of Defamation Law Cannot Be Transplanted Wholesale To All Other Torts Especially Those For Which Falsehood Is Not An Element

It is clear that the actual malice test announced in *New York Times Co. v. Sullivan* and reaffirmed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), was the product of the balance between "the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury," *id.* at 342, but only for defamation cases. Justice Powell's opening remarks in *Gertz* emphasize the context in which the constitutional privilege was being evaluated:

> This Court has struggled for nearly a decade to define the proper accommodation between the *law of defamation* and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for *defamation* of a private citizen

(Emphasis added). (Citation omitted).

The actual malice test of *New York Times Co. v. Sullivan* is appropriate for claims sounding in defamation which involve false statements of fact,[25] and for a privacy violation asserting a "false light" claim, e.g., *Time v. Hill*, 385 U.S. 374 (1967).

[25]Even in defamation cases, blind application of the actual malice test may not be appropriate, for example, in the area of works of fiction. See, e.g., *Bindrim v. Mitchell*, 92 Cal. App.3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979); *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *Miss America Pageant, Inc. v. Penthouse International, Ltd.*, 524 F.Supp. 1280, 1283-84 (D.N.J. 1981) ("While such a test is easily

(footnote continued on following page)

That a different constitutional balance is required for other torts was further emphasized by this Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), where the Court carefully distinguished a "false light" privacy claim from a publicity claim. *Id.* at 573. Justice White explained that "the protection extended to the press by the First Amendment in defamation cases" does not necessarily apply to violation of other state-created torts, such as the right of publicity. *Id.* at 574.

The television station in *Zacchini* faithfully broadcast plaintiff's entire "human cannonball" act on its evening news program, which lasted approximately 15 seconds, without any alteration or distortion, and with favorable commentary. This Court's analysis contrasted the interests protected in a defamation or "false light" privacy claim with the state's concern "in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." *Id.* at 573. In *Zacchini*, this Court concluded that while a state "may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so." *Id.* at 578-79. Thus, this Court held that the Constitution does not forbid liability under the facts of *Zacchini*, which clearly involved freedom of the press in the form of a news broadcast, even though there was no falsehood involved.[26]

(footnote continued)

applied to news items intended to convey truthful information, it is less clear how the Supreme Court would evaluate a work not intended to be truthful. It would seem too simplistic in the case of a fictional or satirical work simply to question whether the author/publisher had the subjective intent to publish a *falsity*, since such works are not intended to convey truth.") Moreover, the *Gertz* balance does not necessarily obtain in a defamation action where the statement does not involve an issue of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

[26]Similarly, this Court noted that freedom of speech does not protect the broadcast of a copyrighted work, *id.* at 575, even though no falsehoods are involved there either.

Upholding Hugo Zacchini's publicity claim, moreover, would not "represent a species of liability without fault" because the news station "knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film." *Id.* at 578. Thus, the intentionality that is part of the tort of commercial appropriation, which does not violate the Constitution, had nothing at all to do with "falsity" because the broadcast in *Zacchini* was truthful and accurate and did not communicate false statements of fact.

In *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975), this Court recognized that while truth is a constitutionally required defense to a defamation action brought by a public figure, truth does not preclude a claim based upon Georgia's "tort of public disclosure." *Id.* at 489-90. In that case, the Court decided the narrow question that the state cannot create a cause of action for the accurate publication of the name of a rape victim obtained from judicial records maintained in connection with a public prosecution and open to public inspection. *Id.* at 491.

The balance in that case struck in favor of "the public interest in a vigorous press" because "the interests in privacy fade when the information involved already appears on the public record." *Id.* at 494-95. However, the Court implied that a different result might obtain if the published disclosure of private facts did not have its source in a public record. And for a plaintiff to recover punitive damages in such a case, the actual malice required to be proven would surely not be subjective awareness of "falsity" since "falsity" is not an element of the tort.

This Court in *Cox* cited with approval the four branches of privacy catalogued in the Restatement and suggested by Dean Prosser. *Id.* at 493-94 and n.22. These include unreasonable intrusion upon seclusion, appropriation of

name or likeness, unreasonable publicity given to private life and "false light" publicity. As to appropriation of name and likeness, this Court in *Time v. Hill,* 385 U.S. 374 (1967), indicated that such a use for advertising or to promote the sale of goods would have to be treated differently than a "false light" privacy claim:

> An application of that limited scope would present different questions of violation of the constitutional protections for speech and press.

Id. at 381.

Under the New York privacy statute involved in that case, §§50-51 of the New York Civil Rights Law, punitive damages may be awarded for a "knowing" use. The tort of commercial appropriation for advertising use does not involve "falsity," and punitive damages would therefore be constitutionally permissible without proof of subjective awareness of "falsity." Indeed, in that case this Court virtually approved the tort of outrageous conduct, recognizing "an interpretation of the statute to allow damages where 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' " *Id.* at 383 n.7, *quoting Sidis v. F-R Publishing Corp.,* 113 F.2d 806, 809 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940).

The Ninth Circuit in *Dietemann v. Time, Inc.,* 449 F.2d 245 (9th Cir. 1971), upheld the tort of wrongful intrusion as a branch of invasion of privacy. In its evaluation of constitutional considerations, the Court of Appeals concluded that: "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." *Id.* at 249. The court rejected the argument that *New York Times Co. v. Sullivan* insulates defendants from liability,

emphasizing that the tort of intrusive conduct is not governed by the same considerations applicable to defamation law. *Id.* at 249-50. If punitive damages were involved in that case upon proof of actual malice, the appropriate standard would have nothing to do with "falsity" because the private facts surreptitiously obtained by subterfuge were all true.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). Thus, certain kinds of speech may be accorded no protection at all, e.g., obscenity and "fighting words," whereas other kinds of speech may qualify for only reduced protection, e.g., commercial speech, and yet other kinds of speech may be strictly regulated, e.g., proxy solicitations. *Id.* at 758 n.5.

Accordingly, the actual malice test of defamation law, involving a defendant's subjective awareness of "falsity" or reckless disregard for the "truth," cannot be engrafted upon and indiscriminately applied to all state-created torts, such as privacy or emotional distress. In this case, therefore, the Court should engage in the same careful balancing process that has characterized all of its prior decisions where constitutional defenses have been raised.

C. The Substantial State Interest In The Prevention Of The Intentional Infliction Of Emotional Distress Outweighs Whatever Dubious Value Defendants' Outrageous Publication May Possess

If this Court recognizes, as plaintiff contends, that the article is nothing more than a series of false statements of fact knowingly made by the defendants for the purposes of inflicting emotional distress upon plaintiff and assassinating his integrity, then the verdict should be upheld because it has repeatedly been stated that there is no constitutional value to such speech. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

However, if the Court concludes that defendants' publication does not amount to calculated "falsehood," then the defendants' right to use speech in this extreme and outrageous manner must be weighed against the countervailing state interest in preventing the intentional infliction of emotional distress.

This Court has long recognized that individual freedom must sometimes be subordinated to protect compelling state interests necessary for an orderly society. The state interest which is protected by the law of intentional infliction of emotional distress is one such compelling state interest.

> Neither the First Amendment nor the Fourteenth constitutes an absolute bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," are permissible "when they have been found justified by subordinating valid governmental interest." The problem in each such case is to weight the legitimate interest of the State against the effect of the regulation on individual rights.

NAACP v. Button, 371 U.S. 415, 453 (1963) (Harlan, J., dissenting).

Here, the problem is to weigh the interest the defendants have in the extreme and outrageous manner in which they vented their hatred of Reverend Falwell against the substantial state interests that exist in the protection of individuals from extreme emotional distress and from the abuse of their dignity and personalities. Justice Stewart in his concurrence in *Rosenblatt v. Baer,* 383 U.S. 75, 92-93 (1966), explained that the Ninth and Tenth Amendments to the Constitution preserve the fundamental right of every human being to be free from speech so oppressive as to exceed all possible bounds of decency:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like to protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Moreover, he emphatically observed that there are limits to the vehemence and venom which the Constitution permits in free debate:

> We use misleading euphemisms when we speak of the New York Times rule as involving "uninhibited, robust, and wide-open" debate, or "vehement, caustic, and sometimes unpleasantly sharp" criticism. What the New York Times rule ultimately protects is defamatory falsehood.

See *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1941), where opinions were held actionable because outrageously stated in the form of "fighting words."

For example, it is inconceivable that this Court would find that liability for the type of vehement speech found in *Raftery v. Scott,* 756 F.2d 335 (4th Cir. 1985), is constitutionally impermissible. The misconduct proven in the *Raftery* case is directly analogous to the misconduct proven in this case because it involved only the communication of venomous opinions with evil intent, and did not result in any physical injury.

In *Raftery,* plaintiff sued his ex-wife, who had absconded with their son while the divorce decree which granted plaintiff visitation rights was still pending. Plaintiff searched for four years to discover the whereabouts of his son, with whom he wished to continue a parental relationship. However, when he finally was able to contact his son, he found that his ex-wife had so poisoned the child with her venomous opinions, that he could not re-establish a relationship. He then sued his ex-wife, not for alienation of affection or libel, but for the intentional infliction of emotional distress.

Like the defendants in this case, the ex-wife in *Raftery* argued that the claim of emotional distress was barred because the defendant was doing indirectly what he could not do directly, namely, asserting a claim of alienation of affection. However, the Fourth Circuit rejected this reasoning, pointing out that each of these torts protected separate state interests. Thus, while the tort of alienation of affection involves relational injury, the tort of emotional distress involves more subjective issues of self-image.

The distinction drawn by the Fourth Circuit in *Raftery* between the narrow subjective state interest protected by the tort of emotional distress and the "relational interests" protected by the tort of alienation of affection is the same distinction that separates plaintiff's emotional distress claim from his claim of libel in this lawsuit. It is

these interests which are protected by the Ninth and Tenth Amendments, and it is against these very real, personal interests that defendants' claimed right to freely publish the Falwell Campari ad in the extremely abusive and outrageous manner they did must be weighed.[21]

In the analogous case of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941), this Court ruled that a person's interest in presenting his opinions in an outrageous and obscene manner was not outweighed by the state's interest in order and morality because the manner of such expression added only slightly, if anything, to the search for truth.

In that case, the defendant was distributing literature of his religious sect in the streets of Rochester. He addressed a local marshall with the following words: you are " 'a God damned racketeer,' and 'a damned Facist and the whole government of Rochester are Fascists or agents of Fascists.' " 315 U.S. at 569. Chaplinsky was subsequently charged and convicted of violating a New Hampshire statute which outlawed what was then viewed as an outrageous mode of speech. This Court upheld the conviction:

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Cantwell v. Connecticut, 310 US 296, 309, 310, 84 L ed 1213, 1221, 60 S Ct 900, 128 ALR 1352.

315 U.S. at 571-72.

The statute in *Chaplinsky* was found not to violate the Constitution because it did not regulate the substance of the defendants' opinion, merely the manner in which it was conveyed. In *Chaplinsky*, this Court weighed defendants' interest in the manner of his expression, the public's interest in the free flow of opinions and the state's "social interest in order and morality," and concluded that the state interest outweighed any First Amendment rights defendant may have had in expressing his opinions in the way he did. Times may have changed, and manners of expression may have changed with them, but defendants' conduct in this case is still an outrage to the concept of any orderly and decent society. Just as the First Amendment interest in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), was "less important than the one weighed in Gertz," here too there is little or no social value in the outrageous statement published, not as a legitimate parody but with the specific design and intention to inflict serious emotional distress.

D. The Balance Of Interests Permits A Finding Of Liability Upon Proof Of Culpable, Intentional Misconduct

The product of the balance of the state's interest in protecting its citizens from the intentional infliction of emo-

[21]The different state interests protected by the law of defamation and the independent tort of intentional infliction of emotional distress are discussed in Point III at pp. 39-44, *infra*.

tional distress and the right of free speech is a test which permits liability for outrageous conduct which has only a slight social value and which is expressed in a culpable, intentional manner offensive to First Amendment principles.

If such a test for the emotional distress tort is to parallel the actual malice standard of defamation law, then it should focus upon the "mens rea" of the publisher rather than the "falsity" of the statement published. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 515, 516 (1984) (Rehnquist, C.J., dissenting). See also *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) ("Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds."); Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24, 52 and n.146 (1983) ("the actual malice standard of the New York Times v. Sullivan, 376 U.S. 254 (1964), is, by nature, a scienter requirement.").

The Court of Appeals reached this same conclusion: "Properly read, *New York Times* focuses on culpability. The emphasis of the actual malice standard is 'knowing . . . or reckless.' " 797 F.2d at 1275. The Court of Appeals, therefore, concluded that the First Amendment protection is satisfied by the requirement under Virginia law that "the defendant's misconduct be intentional or reckless." *Id.* Thus, "[t]he first amendment will not shield intentional or reckless misconduct resulting in damages to reputation, and neither will it shield such misconduct which results in severe emotional distress." *Id.*[28]

[28]If plaintiff prevailed upon only a negligence theory, that might be insufficient to satisfy the constitutional standard. But Virginia does not recognize the tort of negligent infliction of emotional distress, but only the intentional infliction of such harm, so that in this case the constitutional threshold has been satisfied.

That the First Amendment test of culpability may coincide with intentional conduct already required under Virginia state law for the intentional infliction of emotional distress is no reason to reject such a test in the circumstances of this tort action. Depending on the kind of speech involved and the interests to be protected, "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____ , 106 S. Ct. 1558, 89 L.Ed.2d 783, 792 (1986).

Defendants challenge this test on the ground that "the First Amendment protects words spoken or published about public figures with intent to harm, unless the publisher intends to harm by publishing a *falsehood* about the public figure." This argument is misplaced because it again seeks to engraft wholesale on the First Amendment a rule devised within the strict confines of defamation law rather than in the context of an action based upon the intentional infliction of emotional distress.

The differences between the elements of libel and emotional distress are crucial to this analysis because intent to cause injury is not even an element of a defamation claim, while it is the gravamen of a claim for the intentional infliction of emotional distress. Thus, in balancing the state interests involved in a defamation case, the intent to cause injury would not weight heavily because neither the resultant reputational harm nor the public good protected is in any way affected by the speaker's purpose. In contrast, where the tort involved is the intentional infliction of emotional distress, the essential state interest in protecting its citizens from such intentional, calculated misconduct is directly advanced by focusing on the speaker's motives. In short, the culpability standard focuses upon motive in an action for the intentional infliction of emotional distress

because motive is essential to that tort, whereas in defamation falsity rather than motive is the essential element.

E. The Constitutional Standard Was Satisfied In This Case

The culpable misconduct of the defendants amply satisfies the constitutional protection afforded by the First Amendment. The district court charged the jury that in order for plaintiff to prevail on his emotional distress claim, he must prove, *inter alia*, that defendants' conduct was "intentional or reckless," which is satisfied where the wrongdoer "had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result."[29]

Although the jury was asked to make this finding by a preponderance of the evidence, even if a higher burden of proof is required, the court can appropriately determine whether the constitutional standard has been met. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 462 (1974). In denying defendants' motion for judgment notwithstanding the verdict, the district court found that Flynt made his "specific purpose" of inflicting emotional distress upon Reverend Falwell "abundantly clear" and admitted "his own culpable intent."[30] The Fourth Circuit likewise acknowledged the compelling evidence of Flynt's intent to harm Reverend Falwell and the specific desire of causing him emotional distress. 797 F.2d at 1273, 1275, 1276.

At trial, defendants presented the testimony of several Hustler editors in order to vitiate the condemning admissions of Larry Flynt. Hustler senior editor Bruce Helford testified through deposition that he wrote most of the Falwell Campari ad and brought the copy directly to

[29]J.A. 177.
[30]Pet. App. D at D3-D4.

Larry Flynt in order to "expedite matters," thus bypassing the editorial director Kelly Garrett,[31] who also testified briefly at trial. Helford also confirmed that Larry Flynt reviewed and approved the Falwell Campari ad and initialed the copy.[32] The only other Hustler editor to testify at trial was Richard Warren Lewis, who conceded that at the time of the publication of the Falwell Campari ad in the November 1983 issue of Hustler Magazine, he had no editorial responsibility for the contents of the magazine because he first assumed such duties in April 1984.[33] In fact, Mr. Lewis had not even seen the copy for the Falwell Campari ad until after it appeared in Hustler Magazine.[34]

In stark contrast to the limited authority of the Hustler editorial staff, Larry Flynt, the editor and publisher of Hustler Magazine, approved all of the contents of the publication, and specifically approved "every single word" of the Falwell Campari ad.[35]

Larry Flynt, the publisher with ultimate responsibility for the contents Hustler Magazine, testified that he did not intend the offensive publication to be a parody but instead the publication of the truth,[36] even though he had nothing to support his wild fabrications. But he wanted to "settle a score" with Reverend Falwell,[37] to upset him,[38] to hurt him,[39] and to "assassinate" his integrity.[40] As to the resultant harm from this vicious personal attack, Flynt "didn't care then, and don't care now."[41] Accordingly,

[31]Helford testimony, J.A. 170-71.
[32]*Id.*, at 171; Plaintiff's Exhibit 6, J.A. 200.
[33]Lewis testimony, J.A. 59.
[34]*Id.*, at 60.
[35]Flynt testimony, J.A. 95-96, 99.
[36]*Id.*, at 114, 140, 152.
[37]*Id.*, at 112-13.
[38]*Id.*, at 136.
[39]*Id.*, at 152.
[40]*Id.*, at 141.
[41]*Id.*, at 100.

there was ample evidence of culpable conduct on the part of both the individual and corporate publisher of Hustler Magazine sufficient to meet the constitutional standard. See also Statement of the Case, pp. 4-6, *supra*.

Defendants sought to avoid this compelling evidence by the exclusion of Flynt's deposition on the ground that he was "crazy" at the time.[42] At early common law, a charge of mental incapacity, if proven, could be used to challenge a witness' competency to testify. However, under the modern view, such challenge merely goes to the weight of the evidence. Thus, under the Federal Rules of Evidence, even a person who suffers from an obvious mental deficiency will be required to testify unless it is shown that his testimony suffers from some other infirmity such as relevancy. 3 J. Weinstein, *Weinstein's Evidence* §607[4] at pp. 607-44 (1982). Rule 601 of the Federal Rules of Evidence, entitled "General Rule of Competency," provides in relevant part: "*Every person is competent to be a witness* except as otherwise provided in these rules." (Emphasis added).

The Advisory Committee's Note to Rule 601 states in relevant part as follows:

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. *A leading commentator observes that few witnesses are disqualified on that ground. Discretion is regularly exercised in favor of allowing the testimony.* A witness wholly without capacity is difficult to imagine. *The question is one particularly suited to the jury as one of weight and credibility,* subject to judicial authority to review the sufficiency of the evidence.

(Emphasis added) (citations omitted).

In a subsequent section of his treatise on the Federal rules of Evidence, entitled "Mental Incapacity," Judge Weinstein states that: "in cases in which attorneys formerly argued that a witness should not be heard now are illustrative of situations in which the jury will be urged not to believe the witness." 3 J. Weinstein, *Weinstein's Evidence*, par. 607[4] at pp. 607-44. Accord, *United States v. Linstrom*, 698 F.2d 1154, 1162 (11th Cir. 1983).

Although Flynt's behavior at his deposition was at times bizarre, the fact that a witness cunningly feigns incompetence and turns his lucidity on and off like a faucet hardly renders his testimony inadmissible. The receipt into evidence of excerpts from Flynt's deposition was well within the exercise of the district court's sound discretion.

Moreover, Flynt's deposition antics are especially suspect because both *before* and *after* the June 15, 1984 deposition he gave in this case, Flynt was adjudicated *competent* by other federal courts despite similar challenges.

On January 30, 1984, Judge Consuelo Marshall found Flynt competent to stand trial in a criminal prosecution, *United States v. Flynt*, CR-83-979-CBM (C.D. Calif.

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[42]Defendant's presumptuous contention that the Court of Appeals failed to conduct a *de novo* review of the evidence is misplaced. Moreover, the decision in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1985), requires *de novo* review of actual malice only rather than "the ultimate judgment itself," so that "it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual malice question. . . ." *Id.* at 514 n.31. The question of the admissibility or exclusion of the Larry Flynt deposition testimony was therefore not a subject for *de novo* review. Furthermore, independent review of the actual malice proof does not implicate considerations of demeanor and credibility. *Id.* Nevertheless, given the admissibility of Flynt's deposition testimony, the record therefore contains clear and convincing evidence of defendants' culpable conduct.

1984).[43] And on June 26, 1984, only a few days after his deposition was given in this case, United States Magistrate Jean Dwyer likewise adjudicated Flynt competent to stand trial and even to conduct his own defense in the prosecution arising out of his intemperate and profane outburst before this Court in November 1983. *United States v. Flynt,* CR. 83-0582 (D.D.C. 1984).[44] Significantly, Magistrate Dwyer rejected the testimony of Flynt's expert psychiatrist who had occasion to observe him on the day after he was deposed.[45]

At Flynt's competency hearing before Magistrate Dwyer, only eleven days after his deposition in this case, Magistrate Dwyer's observation of Flynt's cross-examination of his own psychiatrist (Dr. Neil Goldman) prompted her to comment: "You have done an excellent job so far. I am impressed by your ability to maintain this examination."[46]

After considering all of the testimony offered, Magistrate Dwyer ruled as follows:

> Counsel, I have during the last hour given this matter a very great deal of thought. I have reviewed the records which have been provided me, not only the psychiatric reports but of various hearings.
>
> We start off with the proposition that anyone who appears before the Court is presumed to be sane and competent and that there must be clear and convincing evidence in my view to overcome that presumption.
>
> With all respect to Dr. Goldman, my observation of Mr. Flynt himself, other psychiatric reports

[43]J.A. 188.
[44]J.A. 186-87.
[45]J.A. 180-81.
[46]J.A. 186-87.

> which have been provided me, lead me to the conclusion that Mr. Flynt is in fact competent and able to assist counsel in his own defense or to conduct his own defense. The Court so rules.[47]

Flynt's remarkable performance before Magistrate Dwyer, which took place only a few days after his deposition was taken in this case, clearly indicates that his antics at the deposition were a carefully orchestrated performance, and that at the time he gave his deposition he was perfectly capable of understanding the implications of his conduct.[48]

Finally, as recently as September 1985, excerpts from the same Flynt deposition were received in evidence in an unrelated case. *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313, 320 (S.D.N.Y.), *rev'd on other grounds,* 800 F.2d 298 (2d Cir. 1986), *cert. denied,* ___ U.S. ___ , 107 S. Ct. 1303 (1987). The Flynt deposition testimony was therefore properly admitted, and provided clear and convincing proof of defendants' culpable conduct. As the district court noted, stronger proof could hardly be envisioned, for "[r]are indeed is the case where an individual defendant so readily admits his own culpable intent."[49]

[47]J.A. 187.
[48]Further illustrating the ruse defendants devised to exclude the Flynt deposition is the fact that Flynt's pre-trial motion to suppress his deposition testimony was supported by the affidavit of the same Dr. Goldman, who stated in support of his conclusions that he had examined Flynt "[o]n June 16, 1984, the day after Larry Flynt's deposition in this matter." J.A. at 180-81. Yet neither Dr. Goldman nor Flynt's lawyers disclosed to the district court that on June 26, 1984, Magistrate Dwyer totally rejected his conclusions after hearing Dr. Goldman's live testimony and reviewing the reports of other psychiatrists who had the opportunity to observe Flynt at greater length.
[49]Pet. App. D at D4.

II.

The opinion doctrine does not bar plaintiff's claim for intentional infliction of emotional distress

A. The Opinion Doctrine Is Limited To Defamation Cases.

Opinion is not a defense to an action arising out of the intentional infliction of emotional distress. The genesis of the opinion doctrine, both at common law and as a constitutional question, has been in the context of defamation actions. There is no common law or constitutional defense of opinion to an action for the intentional infliction of emotional distress.

Although this Court's opinions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 745 (1974), have been interpreted as recognizing an "absolute privilege" for expressions of opinion in the context of a defamation action, this Court has never directly stated the existence of such a doctrine nor expanded the scope of its applicability.

These three decision are all defamation cases. Thus, while it is an open question whether the doctrine of opinion has been elevated to the level of a constitutional imperative, there presently is no common law or constitutional authority for extending the opinion doctrine beyond defamation law to the intentional infliction of emotional distress.

Defendants' contention that the opinion doctrine must be applied to all speech-related conduct is undermined by this Court's decision in *Chaplinsky v. New Hampshire*, 315 U.S. 569 (1941), which upheld a criminal conviction

for the outrageous manner in which the defendant expressed his opinion. The continuing viability of *Chaplinsky* has been repeatedly recognized by this Court, strongly suggesting that the opinion doctrine will not be applied as a matter of constitutional law to areas involving speech-related misconduct other than defamation.

A review of the Restatement (Second) of Torts §§46-62 demonstrates that the common law does not recognize "opinion" as a defense to the tort of intentional infliction of emotional distress. Thus, even though the Restatement expressly recognizes that the tort of intentional infliction of emotional distress is subject to the restrictions of the First Amendment (see, e.g., Restatement (Second) of Torts §566, Comment f), it does not list the "opinion" privilege as a constitutional defense. This is not surprising because a false statement of fact is not an element of the tort of intentional infliction of emotional distress, and the opinion doctrine does no more than distinguish factual statement from other kinds of speech. There is, therefore, no function to be performed by the opinion doctrine in connection with the tort of the intentional infliction of emotional distress.

By contrast, opinion is directly relevent to a libel claim, where the opinion doctrine may be used to challenge the element of the tort which requires proof that the offending statement be a false statement of fact. Clearly, if the statement is opinion and not fact, an essential element of the tort of defamation cannot be proven.

B. Absolute Protection For Opinion Is Not Necessary In Non-Defamation Cases.

Defendants' argument that "opinion and rhetorical hyperbole constitute protected speech under the First Amendment and cannot give rise to civil liability" is a novel and potentially revolutionary concept which is to-

tally unsupported by any rulings of this Court.[10] Although substantial support does exist for the proposition that there is a constitutional privilege for the expression of opinion in a defamation case, this Court has never suggested that the opinion doctrine applies beyond the law of defamation. Furthermore, there is no reason to believe that the adoption of such an absolute wholesale privilege would in any way enhance the vigor of debate in this nation.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 772 (1985), Justice White had "come to doubt the easy assumption that the common-law rules would muzzle the press." Indeed, Justice White correctly observed that "it is difficult to argue that the United States did not have a free and vigorous press before the rule in New York Times was announced." *Id.*

That the press would still remain free, undeterred and vigorous without the opinion rule is supported by the illustrations of political humor and satire mentioned in defendants' own brief and catalogued in the briefs of the amicus curiae—many of those illustration predate the *New York Times* rule by centuries. If the common law of defamation and intentional infliction of emotional distress did not stifle the long tradition of caustic political debate during the last two hundred years, then it will not stifle it now. The only reason defendants must advocate an absolute rule is because their extreme and outrageous conduct

[10]Justice Scalia has noted the unnecessarily expansive constitutional "evolution" concerning the opinion analysis: "Existing doctrine provides ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist." *Ollman v. Evans, supra*, 750 F.2d at 1036. The elevated standard of culpable, intentional conduct provides enough defenses without carving out an area of absolute privilege applicable to tort law generally. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed. 593, 608 (1985) (White, J., concurring).

has gone far beyond even the broad limits of free speech and robust debate.

Unfortunately, pushing the law beyond its outer limits is exactly what Larry Flynt seeks to achieve in this case. He "unequivocably" believes that "free expression is absolute" and he can therefore publish with ever escalating outrageousness anything he wants about a person's private sexual activities, whether real or fanciful and no matter how horrible it may be.[11] But Flynt's brand of free expression exceeds what may be legitimately published about even a public figure. As Justice Stevens stated in his dissent in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____ , 106 S.Ct. 1558, 89 L.Ed.2d 783, 798 (1986): "In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution."

C. The Opinion Doctrine Is Inapplicable Because The Falwell Campari Ad Asserts False Statements Of Fact.

Perhaps the greatest misapprehension which repeatedly surfaces as the principal theme of defendants' brief is their contention that the jury expressly found that the Falwell Campari ad did not assert a false statement of fact. From this crucial misconception flows all of the defendants' arguments, i.e., that if the publication does not constitute a false statement of fact it must therefore be rhetorical hyperbole or opinion which enjoys absolute constitutional protection; and since actual malice is defined as subjective awareness of falsity or reckless disregard for the truth, the absence of a false statement of fact precludes a finding of actual malice.

This argument completely misunderstands what the jury actually found in responding to the first interrogatory

[11]Flynt testimony, J.A. 118, 122-23.

of the Special Verdict Form.[12] The jury merely found that the Falwell Campari ad could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated." While this determination might arguably relate to defamation by the use of indirect statements of fact" or the extent of damages suffered by plaintiff as a result of the circulation of the offensive publication, it does *not* state that the Campari ad was not a statement of fact.

The Falwell Campari ad accuses Reverend Falwell of committing incest with his mother in an outhouse outside Lynchburg, Virginia, being drunk at the time, seeking to repeat the incestuous encounter "lots of times," and always being in a state of intoxication when he preaches from the pulpit.[14] Grammatically and semantically, these accusations constitute declarative statements of fact. The veracity of the accusations may easily be disproved at trial because the offensive publication "undoubtedly admits of a sufficiently ascertainable stable core of meaning." *Ollman v. Evans*, 750 F.2d 970, 1033 (D.C. Cir. 1984) (Wald, J., dissenting in part), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 270 (1985). Whether readers believe the accusations may, of course, relate to the issue of damages, but has absolutely nothing to do with categorizing the statements themselves as fact or opinion."

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[12]Pet. App. C at C1.

[13]Restatement (Second) Torts §565, Comment b, Illustration 1 (1977).

[14]Plaintiff's Exhibit 1, Pet. App. E.

[15]The determination of whether a particular statement is fact or opinion presents a question of law for the court to decide. *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 105 S. Ct. 2662, 86 L.Ed.2d 278 (1985). Accordingly, the question never should have been presented to the jury.

(Footnote continued on following page)

The jury's answer to the special interragatory focuses upon the perception of readers but not upon whether or not the publication asserts false statements of fact. This distinction is illustrated by the statement "gravity causes objects to fall toward the sky." While this statement could not "reasonably be understood as describing actual facts" or "actual events," there is no doubt that the statement makes a false assertion of fact. Thus, the question of "belief" of the statement does not advance the analysis of whether the statement is one of fact or opinion.

Once it is recognized that the Falwell Campari ad plainly communicates factual statements rather than pure "ideas," the opinion doctrine cannot insulate it from liability. Moreover, the evidence of actual malice is overwhelming and unrefuted, Flynt testified that he had information concerning Reverend Falwell's alleged incest with his mother, supported by documentary proof, personal affidavits by eyewitnesses and tape recordings,[16] but none of this evidence was forthcoming during discovery or trial because Flynt just made it up. Flynt's utterly reckless fabrication of false statements of fact amply support a finding of actual malice. *St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968).

(Footnote continued.)

The district court correctly charged the jury that "in order to be libelous there must be a false statement asserting facts about the plaintiff. If there is no representation of fact then there is no actionable libel." While this instruction was essentially correct, interrogatory 1 of the Special Verdict Form was unnecessary. The jury should have been simply asked whether the plaintiff proved libel by a preponderance of the evidence.

[16]Flynt testimony, J.A. 98, 103-04, 105-10, 120-21, 126-27.

D. The Opinion Doctrine Is Inapplicable Because There Is No Rational Relationship Between The Opinion Allegedly Expressed In The Publication And The Manner Of Expression.

Defendants' contention that the article they published about Reverend Falwell was simply a joke, "a humorous social and political comment" which should be tolerated because some degree of abuse is necessary to a free press misses the point completely. The jury did not impose liability against the defendants in this case because they were funny, caustic or incidentally abusive, but because their conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Prosser, *Insult and Outrage,* 44 Cal. L. Rev. 40, 44 (1956).

Thus, although "some degree" of abuse may be the inevitable byproduct of vigorous social or political debate, when the calculated purpose of speech is abuse and the abuse is not merely incidental to the speech, then the publisher has stepped beyond that degree of expression which is tolerated by the Constitution. Even cartoon portraits of public figures, *Ali v. Playgirl, Inc.,* 447 F. Supp. 723, 727, 278 n.9 (S.D.N.Y. 1978), or humorous photographic caricatures, *Burton v. Crowell Pub. Co.,* 82 F.2d 154 (2d Cir. 1936), can give rise to liability without violating the First Amendment when they serve no social purpose and convey no political or newsworthy message, but merely ridicule the subject in an outrageous fashion.

Here, the misconduct alleged is not that defendants called Reverend Falwell a hypocrite, as they now claim, but the intolerable manner in which they allegedly tried to make that point. Just as the defendant in *Chaplinsky v. New Hampshire, supra,* was called to account for the extreme and outrageous manner in which he expressed his opinion, defendants too should be held responsible for the

injuries Reverend Falwell suffered because of the extreme and outrageous manner in which they expressed their so-called opinion of him.

The fact that defendants' offensive publication was intended to be "humorous" does not relieve them of liability nor does it make their conduct any less outrageous to society. Significantly, the tort of intentional infliction of emotional distress was born out of extreme and abusive speech intended as a practical joke. E.g., *Wilkinson v. Downton,* 2 Q.B.D. 57 (1897); *Nickerson v. Hodges,* 146 La. 735, 84 So. 37 (1920); *Great A & P Tea Co. v. Roch,* 160 Md. 189, 153 A. 22 (1930).

At some level of abstraction, all factual accusations, no matter how extreme or outrageous, could be deemed statements of opinion couched in allegorical fashion. However, the Court should scrutinize the *bona fides* of the claim of parody to determine whether the acts depicted in the allegory are rationally related to the conduct being criticized. The element of outrage in the tort of intentional infliction of emotional distress implicitly recognizes that almost any form of social intercourse if pushed to irrational limits may become unreasonably abusive.

As the facts of this case amply illustrate, satire is no exception to the general rule that in the hand of man anything may become a weapon and even art may be used to do violence. It would be surprising if human ingenuity could not devise some devilish corruption of the art of satire and parody so that its use in that corrupt form became socially intolerable.

The defendants' contention that the Falwell Campari ad was somehow intended to portray Reverend Falwell as a hypocrite is highly suspect. Defendants do not claim he is a sexual hypocrite, i.e., they do not contend they ever be-

lieved he had committed any kind of sexual transgression and certainly not the conduct attributed to him in their publication. If defendants did not intend to portray him as a sexual hypocrite in the Falwell Campari ad it is difficult to understand the nature of the conduct they are allegedly lampooning.

Clearly, any accusation of loathesome, bestial behavior could be construed, at some extraordinary level of abstraction, to mean that the person so accused is being satirized. But if the loathesome conduct depicted is not related to the actual conduct of the person being critized, society has a right to declare that comparison "outrageous." Were the states not allowed to prohibit such intentional, outrageous conduct, the defense of opinion would swallow whole the carefully balanced rights still remaining to victims of speech-related abuse.

E. The Statements Made In The Publication Do Not Qualify As Opinion Because They Fail To Disclose The Facts On Which The Alleged Opinion Is Based

The Falwell Campari ad published by the defendants fails to meet the classic formulation of opinion set forth in the Restatement (Second) Torts §566 upon which the alleged opinion is based.

To the extent that the offensive publication contains evaluations laden with factual content, it represents the kind of "hybrid" statement addressed by Chief Judge Robinson, dissenting in part in *Ollman v. Evans, supra,* 750 F.2d at 1024:

> Hybrid statements unaccompanied by any predicate facts, or attended by defective recitals of the underlying facts, thus should occupy a very different position in the concerns of libel law, for their

> claim to First Amendment protections is far less compelling.
>
> * * *
>
> I would hold that a hybrid statement is absolutely privileged as opinion when it is accompanied by a *reasonably* full and accurate narration of the facts pertinent to the author's conclusion. I would further hold that hybrid statements not so accompanied are not entitled to that degree of protection unless those facts are already known to the author's listeners or readers.

Here, of course, there was no communication of truthful or accurate underlying facts, so whatever opinion was sought to be expressed is beyond constitutional protection.

III.

The absence of an award for reputation damage does not preclude damages for emotional distress.

Defendants argue that the same facts which give rise to a defamation claim cannot support a claim for emotional distress, and that the absence of reputation damages forbids an award for emotional distress. This argument is flawed in two respects: first, plaintiff's defamation claim was unsuccessful, so that his recovery for the tort of emotional distress was not a mere "substitute" for a libel claim; second, the jury never reached the question of reputation damages for libel, so that there is no basis for defendants' false assumption that the Falwell Campari ad caused no harm to Reverend Falwell's reputation.

The broad-brush approach that every time a libel claim fails, a companion claim for the intentional infliction of emotional distress necessarily fails with it, must be rejected. Defendants urge this argument without regard to

the historical differences between the two torts and without analyzing the discrete interests each protects, i.e., the "reputation" and "relational" interest in one's good name versus the "personal" interest in avoiding mental distress and humiliation."

Courts have long held that a claim for intentional infliction of emotional distress states a cause of action independent and distinct from both libel and invasion of privacy. See Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evaluation,* 23 Washburn L.J. 24, 27 (1983). Thus, where a plaintiff adduces proof sufficient to satisfy each of the rigorous elements of the tort of emotional distress, it is completely immaterial that he may have failed to prove another cause of action also alleged in his complaint. It is quite common that the same conduct gives rise to different legal claims all of which are simultaneously alleged in a single pleading. Federal Rule of Civil Procedure 8(e)(2); *Ross v. Bernhard,* 396 U.S. 531 (1970). While such claims may have some overlapping or common characteristics, the theory of the claims needed to establish them and the interests protected often differ.

"A basic distinction between defamation and intentional infliction of emotional distress is that the former provides the remedy for invasion of a "relational" interest while the latter provides a remedy for the invasion of a "subjective," nonsocial interest:

> "[D]efamation is an invasion of the interest in reputation and good name. This is a 'relational' interest [citation omitted], since it involves the opinion which others in the community may have, or tend to have, of the plaintiff. Consequently defamation requires that something be communicated to a third person that may affect that opinion. Derogatory words and insults directed to the plaintiff himself may afford grounds for an action for the intentional infliction of mental suffering, but unless they are communicated to another the action cannot be one for defamation. . . . Defamation is not wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action." Prosser, Law of Torts §111 at 737 (4th ed. 1971).

While falsity is an essential feature of a libel claim, it is not an element of claim for the intentional infliction of emotional distress.

The leading appellate case to address this issue upheld the separate existence of these claims. In *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3rd Cir. 1979) (en banc), the Third Circuit sustained a verdict *against* plaintiff on his libel claim while at the same time it upheld a verdict *for* him on his claim for intentional infliction of emotional distress. *Fitzgerald v. Penthouse International, Ltd.,* 525 F. Supp. 585 (D. Md. 1981), *aff'd in part, rev'd in part,* 691 F.2d 666 (4th Cir. 1982), *cert. denied,* 460 U.S. 1024 (1983), raised the analogous question of whether an interference with contract claim can coexist with a libel claim arising out of the same facts. The Fourth Circuit *reversed* the dismissal of plaintiff's claim of interference with business relationships because that tort claim was held to have *independent legal vitality* separate and apart from the libel claim, and failure of the libel claim did not automatically require dismissal of the interference claim. Upon remand, the district court was directed to "reconsider these claims if relief based on plaintiff's cause of action for defamation is denied." 691 F.2d at 672.

In *Apostle v. Booth Newspapers, Inc.,* 572 F. Supp. 897, 905 (W.D. Mich. 1983), plaintiff's sued a newspaper for both defamation and intentional infliction of emotional distress, alleging that the newspaper had falsely implicated their business in a local prostitution ring. Denying the newspaper's motion for summary judgment on the emotional distress claim, the court held that:

> [I]ntentional infliction is recognized as a separate cause of action which does not need to be "parasitic" to a defamation claim:

> Intentional infliction of emotion distress deals with invasions of emotional tranquility, while slander [or libel] is based in protection of reputational interest.
>
> . . . [A] confusion arises because mental suffering is an element of damages in slander, *but since the two torts protect different interests, they must be recognized as separate even when based upon the same conduct.* (Emphasis added).

See also *Braun v. Flynt*, 726 F.2d 245, 250 (5th Cir. 1984) (plaintiff entitled to recover actual damages for mental anguish under either defamation or invasion of privacy); *Pierson v. News Group Publications, Inc.*, 549 F. Supp. 635 (S.D. Ga. 1982) (dismissing plaintiff's privacy claim while denying summary judgment on emotional distress claim); *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984) (distinguishing between "a slander action which involve[s] damage to reputation and an action for intentional infliction of emotional distress which protect[s] a person's right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquility"); *Compos v. General Motors Corp.*, 71 Mich. App. 23, 26, 246 N.W.2d 352 (1956). See generally Restatement (Second) of Torts, §46, Comment b (although "emotional distress may be an element of damages in many cases when other interests have been invaded, . . . within recent years . . . the rule stated in this Section has been *fully recognized* as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort"). See also, Restatement (Second) of Torts §566, Comment f. ("In the case of ridicule or abuse . . . other tort actions than defamation may be pertinent").[18]

[18]This line of cases is not contradicted by *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979), where the Seventh Circuit granted summary judgment on

(Footnote continued on following page.)

The recent New York case cited by defendants, *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 111 A.D.2d 807, 490 N.Y.S.2d 553 (2d Dep't), *aff'd w/o op.*, 66 N.Y.2d 988, 499 N.Y.S.2d 395, 489 N.E.2d 1297 (1985), involved a letter written by corporate counsel concerning plaintiff's failure to pay an alleged debt. The court dismissed the emotional distress claim because the conduct involved plainly was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as outrageous, and utterly intolerable in a civilized community." 490 N.Y.S.2d at 555. The additional comment by the intermediate appellate court, which is quoted by the defendants in their brief, is dicta. The other New York case cited by defendants, *Fischer v. Maloney*, 43 N.Y.2d 353, 558, 402 N.Y.S.2d 991, 993, 373 N.E.2d 1215 (1978), "questioned whether the doctrine of liability for intentional infliction of extreme emotional distress should be applicable where the conduct complained of falls well within the ambit of other traditional tort liability, here malicious prosecution and abuse of process." In this case, of course, defendants have created such an outrageous publication so as to avoid the usual recourse afforded by the law of libel. That radical departure from tolerable behavior, however, should not be used as an excuse to insulate them from other applicable tort liability.

The law of Virginia recognizes the tort of intentional infliction of emotional distress as a distinct and independent

(Footnote continued.)

all claims because there was no actual malice. The Court of Appeals recognized that constitutional considerations would subject the intentional infliction of emotional anguish tort to an "intent inquiry." 579 F.2d at 1036 n. 16. In a later decision, the Seventh Circuit explained that the absence of an allegation of *intentional* conduct fails to meet the constitutional standard. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983).

cause of action. *Raftery v. Scott*, 756 F.2d 335, 339 n.4 (4th Cir. 1985).[59] Few cases will pass the threshold requirements for the tort delineated in *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). Few cases combine the outrageous and intolerable behavior proven here with the deliberate and premeditated intention of the publisher to engage in outright character assassination. There is absolutely no policy reason to extinguish the damages available under this tort in the absence of a successful libel claim. Indeed, the reverse is true, for it is only where a libel claim succeeds and damages for both reputational and emotional harm are recovered, does the separate existence of the emotional distress tort diminish in importance.

IV.

It is inappropriate to ask this court to review proof of damages.

Although defendants prefer to cloak their final argument in the constitutional garb of a "public figure" plaintiff, it is clear under the law of Virginia that for any plaintiff, public or private, to recover damages for this tort he must prove severe emotional distress. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). Moreover, the First Amendment provides no additional obstacle to this stringent common law requirement, for even under libel law "anxiety and concern" qualify as "actual injury"

[59]The existence of the tort of emotional distress presents a question of state law. If, for example, California, *Flynn v. Higham*, 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983), or Oregon, *Ault v. Hustler Magazine, Inc.*, 13 Med. L. Rptr. (BNA) 1657 (D. Ore. Oct. 20, 1986), decide that an emotional distress claim cannot be asserted when the plaintiff has stated a libel claim based upon the same facts, that is a matter of state law. Nothing in those two cases cited by defendants indicates that the dismissal of the emotional distress claim was influenced by constitutional considerations.

and can be recovered without proof of reputation damages. *Time, Inc. v. Firestone*, 424 U.S. 448, 460-61 (1976).

There is absolutely no authority which requires this Court to review the jury's assessment of damages, which was amply proven at trial. Although Reverend Falwell stated at trial that he is not a person who wears his emotions on his sleeve,[60] it is clear that the publication of the Falwell Campari ad led to one of the very darkest moments of his life. He described it as a "very deep wound of personal anguish and hurt and suffering, such as nothing in my adult life I ever recall before."[61] He testified that the publication damaged his ability to concentrate and to focus on the tasks and responsibilities he had fulfilled for years.[62]

This testimony was corroborated by Dr. Ron Godwin, Executive Vice-President of the Moral Majority, Inc., who stated that Reverend Falwell was visibly hurt by the offensive publication, was often preoccupied afterwards, and had difficulty in focusing on details, particularly the details of administering diverse operations of the Moral Majority.[63] Dr. Godwin further testified that Reverend Falwell's general "enthusiasm and optimism" was visibly diminished after the publication of the ad and that effect of the ad often impaired Reverend Falwell's performance."[64] In view of the fact that this testimony came from one of Reverend Falwell's closest associates, who was in a position to observe Reverend Falwell's daily routine, social behavior and working patterns,[65] there can be no doubt that the jury's finding that the distress was severe was rationally based upon the evidence presented at trial.

[60]Falwell testimony, J.A. 39.
[61]*Id.* at 42.
[62]*Id.* at 42-43.
[63]Godwin Testimony, J.A. 52-54, 55.
[64]*Id.*, at 55.
[65]*Id.*, at 52-53.

In *Malandris v. Merrill Lynch, Pierce Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983), the Tenth Circuit upheld an award for the intentional infliction of emotional distress in the sum of $2 million, when the claim for the intentional infliction of emotional distress was predicated upon a $30,000 loss resulting from bad investments in stock options. Quoting from *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1943), the Tenth Circuit observed that: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 703 F.2d at 1158. Defendant's suggestion that the case law defines a threshold of pain that a plaintiff must suffer before he can prevail on a claim for intentional infliction of emotional distress is misplaced. No such threshold can be established, and §46 of the Restatement (Second) of Torts, cited by defendants in their brief, envisions no substitute for careful case-by-case analysis:

> *Severe emotional distress*
>
> • • •
>
> The intensity and duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is itself important evidence that the distress has existed.
>
> It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, of the evidence, it has in fact existed.

Accord, *Paulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981). See also Prosser, The Law of Torts §12 at 60 (4th

ed. 1971) ("the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned or trivial, bodily harm is not required").

Therefore, even though Reverend Falwell testified that his distress continues to this day, it is as important to recognize that the outrageous and completely indefensible character of defendants' publication provides salient evidence of the existence and severity of his distress and suffering.

The damages that flow from emotional distress cannot be quantified or reduced to a scientific formula, and are therefore particularly within the sound discretion of the jury. The cold transcript, of course, cannot provide a substitute for hearing and seeing Reverend Falwell testify at trial, and appreciating firsthand the severe consequences of defendants' profane and insulting publication. It was the jury's task to assess this evidence and to consider the credibility and demeanor of the witnesses. There is nothing in the First Amendment that requires a reviewing court to alter traditional appellate procedure by injecting itself into an evaluation of proof of damages and thereby interfering with the jury process. The Fourth Circuit recognized that reversal is warranted "only when there is a complete absence of facts to support the conclusions reached by the jury." 797 F.2d at 1276, citing *Sherril White Construction, Inc. v. South Carolina National Bank*, 713 F.2d 1047 (4th Cir. 1983). After reviewing the facts, 797 F.2d at 1276-77, the Court of Appeals correctly concluded that proof of damages was not insufficient as a matter of law.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE

JEFFREY H. DAICHMAN hereby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of Brief for Respondent were mailed postage prepaid First Class mail to the following counsel for petitioners:

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JEFFREY H. DAICHMAN

Sworn to before me this
24th day of August, 1987

Nora A. Green
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Commission Expires March 24, 1988

REPLY BRIEF

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No. 86-1278

IN THE

Supreme Court of the United States

October Term, 1987

HUSTLER MAGAZINE, INC.
AND LARRY C. FLYNT,

Petitioners,

vs.

JERRY FALWELL,

Respondent.

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1. Falwell's Claim is Based Upon Alleged Falsities

Falwell argues that the defenses of opinion and actual malice (as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) should not apply to his claim of intentional infliction of emotional distress because such a claim does not depend upon the existence of a false statement of fact. It is true that a typical emotional distress claim is based upon conduct other than speech. Indeed, one of the problems with Falwell's claim in this case is that it does not comfortably fit into the traditional parameters of the emotional distress tort.

Despite his protestations to the contrary, Falwell's claim clearly and admittedly is based upon his allegation that false statements of fact were published about him. For example, the Brief for Respondent reveals that Falwell premises his claim upon the alleged false accusations contained in the ad parody,[1] repeatedly charging that petitioners "accused" or "charged" him with committing incest[2] and characterizing the ad parody as "character assassination"[3] and "nothing more than a series of false statements

---

[1] Even when he attempts to argue that the interest protected by the tort is protecting individuals from emotional distress, Falwell falls back on the law of defamation. See, e.g., Brief for Respondent at 18, where he quotes Justice Stewart on "the right of a man to the protection of his own reputation." (Emphasis added.)

[2] See Brief for Respondent at pp. 2, 4, 8, 42, 45, 46.

[3] See id at 8.

of fact."[4] Moreover, the claim of intentional infliction of emotional distress as *pleaded* by Falwell is clearly premised upon the publication of such false accusations.[5] Falwell's own testimony is in accord. For example, he testified that he was concerned that people who read the ad parody would believe that it was meant to be true.[6] He stated that the ad parody charged him with immoral conduct.[7] The alleged emotional harm, therefore, was clearly based upon the premise that readers of the ad parody would interpret it as making serious factual accusations against Falwell, and that he suffered emotional distress as a result of such accusations.

Although Falwell's brief repeatedly refers to the "extreme and outrageous conduct" of petitioners in publishing the ad parody, he offers no explanation of what it is that makes that conduct extreme or outrageous other than the falsity of the statements contained therein. Nor does he identify any *conduct* aside from mere speech or publication as the predicate for his tort claim. Despite the "mere label" of intentional infliction of emotional distress, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), Falwell's claim upon analysis is in reality a libel claim.

---

4 Id. at 16. See also id. at 42.

5 See para. 22 of the Amended Complaint (J.A.19) ("accusing plaintiff of illegal, immoral and reprehensible acts. . .").

6 Trial Transcript, Joint Appendix in United States Court of Appeals for the Fourth Circuit, p. 822.

7 Id., p. 830; see also pp. 839-49.

2. The Courts Below Improperly Expanded the Tort of Intentional Infliction of Emotional Distress

The courts of Virginia have never expanded the tort of intentional infliction of emotional distress
to encompass a claim whose gravamen is the publication of an injurious falsehood. The federal courts below thus made new law which was unprecedented in Virginia or, indeed, elsewhere. In fact, the first state court in Virginia to speak on the subject very recently rejected a claim such as plaintiff's on the ground that intentional infliction of emotional distress cannot give rise to a separate and distinct cause of action when it is based upon the same allegations as a related libel claim. In *Smith v. Dameron*, Law No. 10998 (Stafford County Circuit Court, September 16, 1987), the court sustained demurrers to claims of libel and intentional infliction of emotional distress, *inter alia*. The court reasoned:

> What is the "conduct" to which the plaintiffs refer as having caused them emotional distress? It is plain from the pleading that the statements themselves constitute the "conduct" referred to by the plaintiffs. These same statements also constitute the alleged defamation which is the gravamen of this action.
>
> As long as words are nothing more than images in the mind, they are not actionable. When they are expressed, they may form the basis of an action for defamation. If the words cause damage to someone's reputation, recovery may be permitted. Among the items of damage

which may be recovered is emotional distress. It follows that a separate action for infliction of emotional distress which is premised solely on allegedly slanderous or libelous words themselves, is not only superfluous but impermissibly duplicative.

The fallacy of the plaintiffs' position is best illustrated as follows. As explained below, the plaintiff in a defamation case must often prove *New York Times* actual malice in order to recover damages. These federal standards have been incorporated into state law. See *The Gazette, Inc. v. Harris*, 229 Va. 1 (1985). If the plaintiff were allowed to use the fact of the utterance of allegedly defamatory words as a basis for an action labelled "infliction of emotional distress" rather than "defamation," the strictures of modern defamation law could be circumvented. Relying solely on a claim which sounds in defamation, but calling it something else, the plaintiff could find himself the recipient of a recovery otherwise prohibited under state and federal law. Neither the substantive nor procedural laws of the Commonwealth can be manipulated to accomplish such a result.

Since the "conduct' relied upon by the plaintiffs in their Count III and Count IV assertions is nothing more or less than the same allegedly defamatory statements which are the basis of their defamation claim, the assertions cannot give rise to a separate and distinct cause of action of

infliction of emotional distress under the circumstances of this case.

Id. at 5-6.

Thus, the only pronouncement of a Virginia *state* court on the availability of this tort in a libel situation rejects the expansive approach of the District Court and Court of Appeals. Petitioners submit that as a matter of constitutional and common law, the reasoning of the state court in *Smith* - the only Virginia state court to consider the question - is far more compelling than that of the courts below.

Falwell contends that *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) is the "leading appellate case" upholding the separate existence of claims for libel and intentional infliction of emotional distress.[8] However, *Chuy* did *not* address the issue whether a flawed libel claim may be resuscitated under the guise of the emotional distress tort; that issue was never raised despite the fact that a libel claim was dismissed therein. *Chuy*, unlike the case at bar, involved statements of *fact*. The claim of intentional infliction of emotional distress was arguably appropriate because the plaintiff suffered distress due to his *belief* that the false report that he had a fatal disease was true.[9] Obviously, no

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8 Brief for Respondent at 41.

9 Chuy thus fits more comfortably into the line of cases cited at p. 37 of Falwell's brief, involving statements which plaintiffs believed to their detriment. See, e.g., Wilkinson v. Downton, 2 Q.B.D. 57 (1897). See also Restatement (Second) of the Law of Torts, sec. 46, illustration 1, cited in Chuy at 1275 n.11.

such case was presented here. Finally, the court found that the defendant had made a false assertion of fact about the plaintiff (i.e. that he was suffering from a fatal disease), with knowledge that he was reporting a falsity. *See* 595 F.2d at 1286 n.8 (statement of Aldisert, J.). Thus, the plaintiff in *Chuy* satisfied the requirement that he prove knowing or reckless falsity on the part of the defendant.

Plaintiff also mistakenly relies upon *Apostle v. Booth Newspapers, Inc.*, 572 F.Supp. 897 (W.D. Mich. 1983). *Apostle* held that "where both defamation and another similar tort arise out of the same facts, consistency requires that the same standard of liability be applied to both torts." *Id.* at 905. The court concluded that the qualified privilege applicable to the plaintiff's libel claim must apply to her emotional distress claim as well. *Id.* at 909. Similarly, plaintiff miscites *Pierson v. News Group Publications, Inc.*, 549 F.Supp. 635 (S.D. Ga. 1982), and *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). In *Pierson*, a false light claim survived along with the emotional distress claim. In *Craft*, there was no real libel claim involved. Rather, the gravamen of the complaint was that the defendant sheriff was "keeping the plaintiff under surveillance at work and home, threatening to put her husband in jail, and driving so as to force her vehicle into an opposing lane of traffic."

See also *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983)(rejecting claim of interference with business relations based upon same facts in libel claim which would be "end run" around "rules on defamation" because it would "enabl[e] the plaintiff to avoid the specific limitations with which the

law of defamation - presumably to some purpose - is hedged about.").

Since the filing of Petitioners' original brief on the merits, two additional courts have commented upon, and rejected, the Fourth Circuit's holding below and have dismissed emotional distress claims which were based upon defective libel claims. *Williams v. First Federal Savings Bank of Puerto Rico*, 14 Med.L.Rptr. 1033, 1041-1042 (D.V.I. 1987); *Dworkin v. Hustler Magazine, Inc.*, 668 F.Supp. 1408, 1420-21 (C.D. Cal. 1987).

The Court hinted at a similar approach in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), when it considered a libel claim brought by a plaintiff who had withdrawn her claim of reputational harm. Concluding that recovery could be permitted for libel based "on elements other than injury to reputation," such as "personal humiliation, and mental anguish and suffering," the Court nevertheless observed that "this does not transform the action into something other than an action for defamation as that term is meant in *Gertz*." *Id.* at 460. The court required a showing of fault as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).[10] Thus, the rules applicable to libel continue to apply even when the plaintiff seeks an award only for his emotional distress.

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[10] Since the plaintiff was a private figure, a showing of negligence would suffice. Had the plaintiff been a public figure, she would have had to prove knowing or reckless falsity.

3. The Jury Found That There Was No Statement of Fact

Falwell distorts the jury's finding on his libel claim, suggesting that it was simply a finding that he suffered no damage as a result of the circulation of the ad parody.[11] In fact, however, the jury's special verdict did not simply find that no readers of the ad parody believed that the statements therein were true; rather, it found that the ad parody *could* not "*reasonably* be understood as describing actual facts about plaintiff or actual events in which plaintiff participated."[12] Falwell makes a false distinction between "the perception of readers [and] whether or not the publication asserts false statements of fact."[13] In fact, the two tests are one and the same. See *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), where the Court found a statement to be constitutionally protected as rhetorical hyperbole precisely because "no reader could have thought that [the defendants] were charging Bresler with the commission of a criminal offense."[14]

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11 Brief for Respondent, p. 34.

12 Pet.App. C. at C1.

13 Brief for Respondent, p. 35.

14 Indeed, Falwell's citation to the jury instruction that "in order to be libelous there must be a false statement asserting facts about the plaintiff", Brief for Respondent at 35 n.5, only underscores the fact that the jury was properly instructed on statements of fact and was aware that its finding meant there was no statement of fact in the ad parody.

4. Without Falsity, The Ad Parody Is Not Actionable

In citing the comment in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) that the knowing or reckless falsity standard was not being applied to a private figure false light case through a blind application of *New York Times v. Sullivan*, Falwell suggests that knowing or reckless falsity is not required for the emotional distress tort, even when the gravamen of the claim is the publication of an injurious falsehood. In fact, *Time v. Hill* represented an *expansion* of the knowing or reckless falsity test to suits brought by *private* figures for invasion of privacy. The Court's comment thus can hardly be cited as authority for a restrictive application of the requirement. Indeed, the Court suggested that the knowing or reckless falsity test might be *less* appropriate in a private figure libel action than in an invasion of privacy action, because in the libel action "the additional state interest in the protection of the individual against damage to his reputation would be involved." 385 U.S. at 391. Similarly, a claim of intentional infliction of emotional distress is not one in which the interest in protecting reputation is involved.[15] If *Time v. Hill* offers any guidance in this case, it is that there is *less* reason to tip the balance in the plaintiff's favor when all that is involved is the interest in preventing alleged emotional distress. False light invasion of privacy is concerned with mental anguish, *Eastwood v. Cascade Broadcasting*, 106 Wn.2d 466, 722 P.2d 1295, 13 Med.L.Rptr. 1136, 1138 (1986); *see Time*

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15 Falwell's reputation suffered no damage, as the jury found in rejecting his libel claim.

v. Hill, supra, 385 U.S. at 384 n. 9.[16] Similarly, the tort of intentional infliction of emotional distress is concerned with mental anguish.[17] Thus, as with false light, the emotional distress tort must also be governed by the knowing or reckless falsity standard, especially when the plaintiff is a public figure.

Falwell incorrectly asserts that the Court "virtually approved the tort of outrageous conduct" at footnote 7 of *Time v. Hill* when in fact the Court was addressing the separate tort of public disclosure of intimate private facts. Moreover, the Court expressly declined to take a position even on the constitutionality of the latter tort. *Id.*, 385 U.S. at 383 n. 7.

In *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Court applied the same First Amendment protections applicable in a libel action to an action for "insulting words," a cause of action which appears to be indistinguishable from an action for intentional infliction of emotional distress based upon words spoken or published. The insulting words action, like the emotional

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16 Indeed, even if the tort of intentional infliction of emotional distress can ever be applied to a publication, it would be difficult to distinguish the tort from false light. The first of the two elements of false light--"the false light in which the other was placed would be highly offensive to a reasonable person," Restatement (2d) of the Law of Torts sec. 652E--is virtually indistinguishable from the second element of the emotional distress tort, requiring outrageousness.

17 See Respondent's Brief at 40.

distress action, *differs* from a defamation action in that it does not require publication to a third party. *Carwile v. Richmond Newspapers*, 196 Va. 1, 6, 82 S.E.2d 588 (1954); see *Letter Carriers, supra*, 418 U.S. at 269 n. 3. Hence, the tort in *Letter Carriers* was actually more akin to intentional infliction of emotional distress than to libel. If rhetorical hyperbole and words not published with knowing or reckless falsity are immune from liability for insulting words, they are equally immune from liability for intentional infliction of emotional distress.

Falwell's reliance on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), is misplaced. *Zacchini*, unlike the case at bar, involved *proprietary* rights rather than personal rights. *See* 433 U.S. at 573. As the Court noted, the right of publicity protected in *Zacchini* was "closely analogous to the goals of patent and copyright." *Id.* at 573; *see also id.* at 575. The court observed that the rationale for the right of publicity "is the straightforward one of preventing unjust enrichment by the theft of good will." *Id.* at 576. Indeed, *Zacchini* was relied upon by the Court in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 549, 557 (1985), where the Court forbade wholesale copying of a copyrighted work just as *Zacchini* permits the states to forbid the broadcast of a performer's entire act.

Moreover, *Zacchini*, unlike the case at bar, did not actually involve freedom of expression. The defendants in *Zacchini* did not engage in expressive activity; rather, they simply engaged in wholesale appropriation of the plaintiff's work. Put another way, *Zacchini* did not involve a tort which was concerned with the *content* of the

defendants' publication. The right of publicity claim in *Zacchini* simply related to the theft of the plaintiff's act and had nothing to do with anything said by the defendants. In fact, *Zacchini* may be said to be concerned with the defendants' *conduct* rather than their *speech*, in contrast to the case at bar.

Ultimately *Zacchini*, like *Harper & Row* before it, is simply a case involving the defendant's "reaping the fruits of complainant's efforts and expenditure." *See International News Service v. Associated Press*, 248 U.S. 215, 241 (1918). It has no impact on the issues before the Court in this case.

Falwell's citation to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499-500 (1975), is misleading when Falwell quotes a passage as being the language of "this Court." See Brief for Respondent at 11. In fact, the quotation was from a concurring opinion. The opinion of *the Court* in *Cox* expressed concern over attempts to impose "sanctions on pure expression--the content of a publication--and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 495.

Falwell miscites Justice Scalia's dissent in *Ollman v. Evans*, 750 F.2d 970, 1036 (D.C. Cir. 1984)*(en banc)*, *cert. denied*, 471 U.S. 1127 (1985), in support of a restrictive interpretation of the defense of opinion or rhetorical hyperbole. Justice Scalia's dissent did not purport to reject or limit those defenses, other than to conclude that such defenses do not apply to what he regarded as an assertion of fact. In fact, his dissent noted that "hyperbole is an expected form of expression" in the context of political rhetoric and subscribed to

the notion that such hyperbole is present when "no reasonable person would believe" that a statement is literally true. *Id.* at 1036.

5. Cases Involving Conduct Rather Than Expression Are Inapposite

Falwell's reliance on *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), is totally misplaced since that case involved "liability for intrusive *conduct* antedating publication," *id.* at 250, rather than speech or publication.

Falwell blatantly misrepresents the facts of *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985), as "involv[ing] only the communication of venomous opinions with evil intent."[18] In fact, the conduct in *Raftery* consisted of a mother's successful efforts to alienate and isolate her child from his father. Among the tortious conduct was the mother's absconding from the state with the child during the pendency of her divorce, the father's inability to locate his son for several years, an "unwarranted breach in the physical relationship," *id.* at 339, and the mother's "continuing and successful effort to destroy and to prevent rehabilitation of the relationship between the former husband and their son." *Id.* at 337. Thus, *Raftery* is not simply another case involving "vehement speech." Nor did the court in *Raftery* ever characterize the wife's conduct (as Falwell creatively does) as the communication of "opinions."

6. "Outrageous" Speech May Not Be Punished

The judgment below cannot stand unless the Court is willing to permit a jury to award damages

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[18] See Brief for Respondent at 19.

for unpopular expression simply because the jury finds the expression distasteful. First Amendment jurisprudence has long rejected such an approach. See *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969). Indeed, the principle that speech cannot be punished or regulated simply because it is outrageous has permitted far more outrageous speech than is presented by the ad parody, even when such speech *will* result in emotional harm to some. *See, e.g., Collin v. Smith*, 578 F.2d 1197, (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), where the court acknowledged that the views expressed by the Nazis marching in Skokie were "repugnant to the core values held generally by residents of this country" and that "many people would find their demonstration extremely mentally and emotionally disturbing." 578 F.2d at 1200. In *Collin*, the court noted that speech that "even stirs to anger" is "among the 'high purposes' of the First Amendment." *Id.* at 1206. Thus, Falwell's anger and his supposed emotional distress due to what he and a jury deemed to be an outrageous publication cannot justify an award based upon such speech. The First Amendment "must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." *Id.* at 1210.

Not only does it offend First Amendment values to permit punishment for making statements a jury deems "outrageous," but an "outrageousness" standard provides juries with little guidance and, more important, gives no guidance to speakers and publishers as to what they may or may not say or publish. What is outrageous to one man may be reasonable to the next. A tort which punishes speech of such scope without offering any reliable

guidelines is both fatally overbroad and vague. Such a tort threatens to be applied regularly to protected expression. *See City of Houston, Texas v. Hill*, --- U.S. ---, 107 S.Ct. 2502, 2512 (1987); *Pope v. Illinois*, --- U.S. ---, 107 S.Ct. 1918, 1923 (1987)(Scalia, J., concurring). As Justice Scalia observed in *Pope* after noting the lack of an ascertainable standard for determining serious literary, artistic, political or scientific value, "I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it." *Id.*

Chaplinsky v. New Hampshire, 315 U.S. 568 (1941), does not, as Falwell suggests, permit punishment or liability due to the outrageous manner in which one expresses one's opinion. Rather, *Chaplinsky* simply recognized a narrow exception to the protections of the First Amendment when the words uttered are "fighting words" likely to provoke imminent violence. *Id.* at 573. The narrowness of this exception was confirmed in *Street, supra*, 394 U.S. at 592, and *Cohen, supra*, 403 U.S. at 20. Indeed, in *Cohen* the court immunized words far more offensive than those published in the case at bar. The fact that the words are distasteful provides no basis for withdrawing constitutional protections. In *Cohen*, the Court acknowledged that

> to many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even *offensive utterance*. . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of

> individual *distasteful* abuse of a privilege, these fundamental societal values are truly implicated.

Id. at 24-25 (emphasis added). The Court concluded that "what is one man's vulgarity is often another's lyric" and that "the Constitution leaves matters of taste and style . . . largely to the individual." *Id.* at 25.

Yet Falwell would predicate his recovery on nothing more than the offensive and distasteful nature of the ad parody, based upon a tort whose operative standard is whether something "offends generally accepted standards of decency and morality,"[19] and ignoring the well established rule that "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1974).

Falwell would discard this fundamental notion of First Amendment jurisprudence and add to the "well defined and narrowly limited classes of speech" outside the First Amendment's protection, *Chaplinsky*, 315 U.S. at 571, a new and necessarily vague class of "outrageous" speech. Even as long ago as the time of *Chaplinsky*, such a notion was unacceptable. Indeed, shortly before *Chaplinsky* the Court made an observation seemingly tailor-made for the facts of the case at bar:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of

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19 Opinion, Pet.App.A. at A10 n.4.

> view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). *See also Rankin v. McPherson*, --- U.S. ---, 107 S.Ct. 2891 (1987)("inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." 107 S.Ct. at 2898.)

7. There Was Not Clear and Convincing Evidence of Malice

Even assuming that proof of ill will or intent to harm could satisfy the First Amendment interests in this case, the only evidence which conceivably supports a finding of such malice consists of the deposition testimony of Larry Flynt, who neither authored nor even inspired the ad parody.[20] Moreover, Flynt's deposition testimony is in stark contrast to his testimony at trial (as well as that of all other Hustler personnel involved in the decision to publish the parody). See J.A. 60-69.

Petitioners objected to the admission of Flynt's deposition testimony on the grounds that he was not competent at the time his deposition was

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20 See Brief for Petitioners, Statement of the Case at 3.

taken. Indeed, for that reason defendants had objected to the taking of the deposition.[21]

The circumstances pertaining to Flynt's incompetency at the time of his deposition have already been related to the Court.[22] However, the best evidence of Flynt's incompetence at the time of the deposition can be found in the videotape of the deposition itself, which is part of the record in the courts below. Petitioners submit that the Court must view this videotape in order to appreciate, as a prominent psychiatrist who viewed it in the courtroom observed, that the behavior exhibited on the videotape is "a classic example of manic depressive disease."[23]

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[21] See J.A. 180-185. The motions for a protective order to prevent the taking of the deposition may be found in the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit at pp. 49-61 and 92-102.

[22] See Brief for Petitioners at 5 n.13 and Petitioners' Reply Brief (in support of the petition for a writ of certiorari) dated March 24, 1987, at 2-5. See also United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985), where the Ninth Circuit reversed a contempt citation due to Flynt's obvious mental problems.

[23] Testimony of Dr. Saul Niedorf, J.A. at 75. Falwell argues that the fact Flynt was adjudged competent to stand trial on other occasions in the same general time period proves that his deposition testimony was competent. This argument betrays an ignorance of manic depressive behavior which, as Dr. Niedorf observed, "depends on when you catch him," J.A. at 82, as well as ignorance of differences between competency to testify and to stand trial.

If the Court accepts the Fourth Circuit's conclusion that the "actual malice" standard is satisfied by intent to harm, then the Court should conduct an independent, *de novo* review of the evidence of such constitutional malice. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The duty of independent review extends to an examination of the Flynt deposition, because that deposition constituted the *only* evidence of malice in the case. Moreover, this *de novo* review must determine whether the evidence of "actual malice" is *clear and convincing*. Petitioners submit that Flynt's deposition testimony, even if it may be considered, does not meet that elevated burden of proof, especially in light of the fact that all other evidence on the issue pointed to a lack of malice.

Falwell's citations to Federal Rule 601 and authorities for the proposition that a witness is presumed to be competent miss the point. Rule 601 is designed to insure that the jury may hear all witnesses who may have relevant information. In the case at bar, the jury was able to hear Flynt testify in the courtroom, and Falwell's counsel was able to cross-examine Flynt. Petitioners are aware of no cases in which Rule 601 was extended to require admission into evidence of *deposition* testimony of one who was clearly incompetent at the time of the deposition, especially when the witness was available to testify at trial.

8. The "Message" of the Ad Parody Is Constitutionally Protected

An examination of the ad parody reveals that it is well within the scope of expression guaranteed by the First Amendment. It is, in part, simply a parody of Campari ads which comments on the

use of sex and celebrities to sell liquor. It also consists of political and social comment on Falwell, probably the archetypical public figure of his day. The message of the parody can probably best be summed up by the final statement in the parody, "You don't think I could lay down all that bullshit *sober*, do you?" The real thrust of that sentence, and of the parody in general, is that Falwell's message is "b.s." The additional statements in the parody serve the typical function of satire, identified by Judge Wilkinson, of tearing down facades, deflating stuffed shirts, and unmasking hypocrisy. See Pet.App.B at B10. Pulling Falwell off of his pedestal by means of a nonsensical, unbelievable story which portrays him as all too human, prepares the reader to laugh at him and to accept the political message that this formidable public figure's teachings are nonsense.[24]

Respectfully submitted,

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[24] The unbelievable reference to incest with his mother may also be seen as a literal allusion to a common, albeit quite distasteful, pejorative term which regrettably but lawfully is used in heated argument and debate. This, too, is a message which the First Amendment, deliberately oblivious to matters of taste, permits and protects.

No. 86-1278

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

HUSTLER MAGAZINE, INC.
AND LARRY C. FLYNT,

Petitioners,

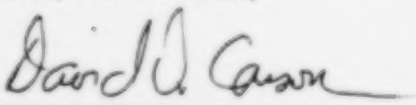
vs.

JERRY FALWELL,

Respondent.

CERTIFICATE OF SERVICE

I, David O. Carson, a member of this Court, hereby certify that on this 23rd day of November, 1987, three copies of the Reply Brief for Petitioners in the above-entitled case were mailed, first class postage prepaid, to Norman Roy Grutman, Esq., Grutman, Miller, Greenspoon & Hendler, 505 Park Avenue, New York, N.Y. 10022, counsel for the respondent herein.



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BRIEF

MOTION FILED
JUN 12 1987

No. 86-1278 (6)

IN THE

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OCTOBER TERM, 1986

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Petitioners,

v.

REVEREND JERRY FALWELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE OF RICHMOND NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VA., THE NEW YORK TIMES COMPANY, THE TIMES MIRROR COMPANY, VIRGINIA PRESS ASSOCIATION, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AND THE MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the Amici described more fully in Appendix A move the Court for leave to file the accompanying Brief Amicus Curiae In Support of Petitioners. The Amici Curiae submitting this brief are publishers of daily newspapers and magazines, and various trade associations that represent newspapers and magazines in Virginia and throughout the United States.

Amici have a substantial interest in the outcome of this case, which will determine whether a public figure can circumvent the first amendment restrictions

placed on actions for defamation by simply labeling his claim as one seeking recovery for intentional infliction of emotional distress. The decision of the Court of Appeals, if allowed to stand, directly threatens Amici's ability to express freely their views in editorials, in editorial cartoons, and in other commentary on subjects of public concern, and to report harsh or provocative views expressed by others.

Petitioners are not in a position to represent Amici. The publication out of which this case arises was, in the eyes of many, indecent and outrageous. Amici are supporting Hustler only because of the principle at stake in the case. The decision of the Court of Appeals allows punishment not only of Hustler's opinions, but also of any unpopular or unfair opinions that are intended to cause someone emotional distress and have that effect. As such, the precedent set by the lower court's decision threatens the ability of all publishers to present a diversity of views to the public.

Petitioners are willing to consent to the filing of this brief, but respondent has declined to consent. Amici therefore move this Court for leave to file the accompanying brief.

Respectfully submitted,

/s/ ALEXANDER WELLFORD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1278

HUSTLER MAGAZINE, INC., et al.
Petitioners,

v.

REVEREND JERRY FALWELL
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF RICHMOND NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VA., THE NEW YORK TIMES COMPANY, THE TIMES MIRROR COMPANY, VIRGINIA PRESS ASSOCIATION, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AND THE MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The interest of Amici is set forth in the Motion For Leave To File that is bound with this brief. A description of Amici is set forth in Appendix A.

SUMMARY OF ARGUMENT

The decision below threatens the destruction of the first amendment protections for speech that through the years have been carefully crafted by this Court.

This Court, in holdings that encompass the entire landscape of first amendment concerns, has consistently refused to permit the abridgement of speech merely because it is emotionally disturbing or offensive to a recipient's sensibilities. Those holdings will be sabotaged if plaintiffs, by resorting to new tort theories, succeed in circumventing the well developed requirements of libel and invasion of privacy and are thus permitted to punish speech solely on the basis of its capacity to generate emotional distress. The crippling effect on robust and outspoken comment and criticism will be devastating.

In light of the jury's finding that no reasonable person could interpret Hustler's ad parody seriously as a literal misstatement of fact, the lower court's ruling effectively revives the common-law notion of punishing outrageous opinions. Opinions often are distress-inducing, calculated to provoke and disturb, and frequently are couched in emotionally incendiary language. But opinions do not forfeit their first amendment protection merely because they are harsh, indecent, or indecorous.

The ad parody in this case caused no harm to Reverend Falwell other than his emotional distress. Standing alone, the power of speech to generate emotional distress is not enough to justify its abridgement. Speech may be punished only when it produces some other more palpable species of social harm which government may seek to prevent. Whatever interests

the state may have in sheltering individuals from severe emotional distress, those interests are insufficient to justify the drastic interference with free speech values caused by the ruling below.

The Court of Appeals mistakenly assumed that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. This effectively equated common-law malice with constitutional actual malice, despite the axiom that proof of publication with common-law malice is not enough to satisfy the *New York Times* actual malice standard. The lower court also ignored this Court's admonition that public figures must recognize infliction of emotional distress from cultural and political adversaries as part of the risk they assume when entering the public arena, and must resort to the corrective power of counterspeech to soothe their feelings rather than seek damages through the legal process.

Punishment of speech because it is intended to cause emotional distress threatens the country's long tradition of robust political and social comment. Editorial opinions, political cartoons, and other forms of outspoken or satiric expression are often effective precisely because they are shocking to mainstream cultural sensibilities. The editorialist's very purpose may be to be outrageous. It is an unavoidable consequence of the emotive power of such speech that it frequently carries more power to inflict pain than other genres of expression. The satiric attack in this case was admittedly outside conventional mores. But if the attack is not otherwise punishable—if it is not legally obscene, if it contains no defamatory lies, if it does not pose a clear and present danger of viol-

ence—then it may not be sanctioned merely because it is emotionally distressing to its target.

ARGUMENT

I. THE CAPACITY OF SPEECH TO CAUSE EMOTIONAL DISTRESS BECAUSE IT IS OUTRAGEOUS, IMMORAL, OR INDECENT IS NOT SUFFICIENT TO JUSTIFY ITS ABRIDGEMENT

A. Speech Designed to Provoke Emotional Distress in Public Officials or Public Figures is Not Actionable, Even if Vulgar or Insulting, Unless it Poses an Imminent Threat of More Palpable Social Harm

In *Gitlow v. New York*, 268 U.S. 652 (1925), Justice Holmes said that "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." *Id.* at 673 (Holmes, J., dissenting). The same is true of the discourse in this case. Hustler's ad parody caused no harm other than the infliction of emotional distress on Falwell, an admitted public figure. To allow recovery for that distress—in the absence of any other demonstrable harm—would effectively destroy the first amendment doctrine that this Court has so carefully crafted in a broad universe of decisions involving defamation, privacy, and many other subjects.

The power of speech on issues of public concern to generate severe emotional distress is *never* enough, standing alone, to justify abridgement of that speech, even when the infliction of emotional distress is intentional.[1] Speech may be punished only when it pro-

[1] A different constitutional balance may be struck with speech involving no issue of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Connick v. Myers*, 461 U.S. 138 (1983). *See generally* Restatement (Second) of Torts §46, Comments d, e, f (1965) (providing illustrations of purely private speech that may give rise to claims for intentional infliction of emotional distress). That question need not be addressed in this case, since Falwell is an admitted public figure.

duces some other more palpable species of harm which the government may seek to prevent. As the Court explained in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

The First Amendment allows some room for defamation and false-light invasion of privacy claims, because the causes of action concern more than the protection of reputation and emotional tranquility; they serve the state's interest in deterring the publication of damaging false information. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984). Because there is "no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), a state may provide remedies for the

emotional injuries arising from such false statements. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Where falsity is absent, however, a different result obtains. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the father of a deceased rape victim was denied recovery for the emotional injuries allegedly caused by the publication of his daughter's name in violation of a Georgia statute prohibiting such disclosure. In addition to holding that the father's action was barred, the Court recognized that, at least where public figures or public officials are concerned, falsity is a constitutionally required predicate to recovery for injury to one's reputation or psyche.[2] See 420 U.S. at 490.

As with false words, the First Amendment permits punishment of speech that infringes a protected common-law property right in one's name or likeness, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), or that interferes with protected copyright interests, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), or that interferes with the orderly administration of the selective service system, *United States v. O'Brien*, 391 U.S. 367 (1968). The critical point is that in each of these situations speech is being regulated not because

[2] The Court's decision left open the question whether falsity is always required in cases involving private persons. In a concurring opinion, Justice Powell stated his view that *Gertz* had decided the question left open by the majority in favor of such a falsity requirement. At least with respect to publications involving an issue of public concern, Justice Powell's view was recently confirmed by the Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ___, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), which held that the First Amendment requires a private figure defamation plaintiff to prove falsity.

of its intellectual or emotional impact, but because it interferes with a legitimate social interest unrelated to content.[3]

So, too, states may legitimately ban obscene publications, after meeting the rigorous definitional requirements of obscenity, because obscene material has been declared by this Court to be utterly devoid of first amendment value. *See Miller v. California*, 413 U.S. 15 (1973). In the special first amendment context of broadcast regulation, with the unique social interests at stake in the regulation of the broadcast spectrum, the government also possesses a narrow power to regulate vulgar speech that does not rise to the level of the legally obscene. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Never has this Court permitted speech to be punished because of its emotional impact alone. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others . . . ."). No one can deny, for example, the intense emotional distress that may be generated by the spectacle of members of the American Nazi Party marching in uniformed lock-step through a Jewish community, or by hooded members of the Ku Klux Klan burning crosses and shouting vicious slurs against Blacks, Jews, and Catholics. Yet it is now axiomatic that such speech, however offensive to

[3] It is worth noting that first amendment doctrine has been recognized to require that parody or satire be permitted broad scope when faced with claims of infringement of a copyright or the right of publicity. *See Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

mainstream values solicitous of racial and religious tolerance, is nevertheless protected unless it creates a clear and present danger of lawless action, a test that requires that the threatened violence be imminent and likely. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also Near v. Minnesota*, 283 U.S. 697 (1931).

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld a criminal conviction against a Jehovah's Witness for uttering "fighting words" to a city marshall in the course of an incident arising from a hostile crowd reaction to the appellant's proselytizing on the street. The Court stated that certain "well-defined and narrowly limited" classes of speech have never been thought to raise any Constitutional problem, including "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 571-72. In the years since *Chaplinsky* the Court has made it clear that the "fighting words" concept embraces only those sorts of face-to-face confrontations that threaten to provoke immediate violence. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1970) ("No individual *actually or likely to be present* could have regarded the words . . . as a direct personal insult.") (emphasis added); *see also Chaplinsky*, 315 U.S. at 573 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

Of significance to a proper assessment of Reverend Falwell's claim is this Court's solid rejection of the view that insults and vulgarities may be penalized merely because they offend the recipient's sensibilities. In *Cohen v. California*, 403 U.S. 15 (1970), in

which the defendant wore the words "fuck the draft" on his jacket, the Court emphasized that the state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to hostile reaction." *Id.* at 20. Rather, the Court emphasized that the state was attempting to penalize *only* the fact of communication. *Id.* at 18. This, the Court held, the state could not do.

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

Id. at 25.

Similarly, in *Street v. New York*, 394 U.S. 576, 592 (1969), a flag desecration case, the Court wrote:

> [a]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

See also Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

The ad parody in this case was neither gentle nor genteel; its shock effect was purposeful, and to most, offensive. But the parody cannot be penalized for that

offensive shock effect alone without turning back the clock on decades of entrenched first amendment doctrine.

B. Speech That is Mere Opinion or Rhetorical Hyperbole is Absolutely Protected by the First Amendment, Even if it is Outrageous, Immoral, or Indecent

The jury's specific finding that no reasonable person could interpret the Hustler ad parody as a literal misstatement of fact renders this case indistinguishable in principle from the holding in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). In *Bresler*, the Court held as a matter of law that the word "blackmail" in the particular circumstances of the case was not actionable:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that . . . their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id. at 14. *Bresler*, it must be remembered, was necessarily decided as a matter of federal constitutional law. The Court's ruling that the language was "rhetorical hyperbole" and not actionable was not an exercise in interpreting common-law tort doctrine, but a constitutional holding that the First Amendment

forbids tort penalties for expressions that no reasonable reader could interpret as misstatements of fact. Surely Bresler suffered emotional distress from being the object of a "vigorous epithet" in a heated community controversy. Yet it is impossible to believe that if Bresler had been clever enough to include in his lawsuit a supplementary cause of action for emotional distress, the Court would have reached a different result on his claim. *See Blatty v. New York Times Co.*, 421 Cal.3d 1033, 232 Cal. Rptr. 542, 549, 728 P.2d 1177, 1184 (1986) ("Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than "defamation" to their injurious-falsehood claims . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose.").[4]

In *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the

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[4] The concerns expressed by the court in *Blatty* are well illustrated by an article that appeared in the Virginia Lawyers' Weekly less than two weeks after the Fourth Circuit's decision in the instant case. The headline advised: *"Plaintiff's Attorneys: Try to Include 'Intentional Infliction of Emotional Distress'."* Virginia Lawyers Weekly, Aug. 18, 1986, at 1, col. 4. The accompanying article explained: "For the second week in a row, we are reporting a case where a plaintiff has been saved because he included a count for 'Intentional Infliction of Emotional Distress'. . . . So it appears that a count for 'Intentional Infliction of Emotional Distress' should always be included in a suit wherever possible." *Id.*

Court had before it language every bit as emotionally incendiary as the Hustler ad parody. In the midst of a heated labor dispute a union newsletter printed a "list of Scabs" and included Jack London's scathing definition of a scab.[5] That definition, the Court stated, was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

The Court in *Letter Carriers* obviously believed that this "lusty and imaginative expression of contempt" was designed to inflict distress, to express disgust and loathing; even so the expression was not actionable, because it could not be reasonably understood

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[5] London's definition:

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

418 U.S. at 268.

as a literal misstatement of fact. *Letter Carriers* therefore is an important guide to the correct resolution of this case. In the rough and tumble controversies in American life, *Letter Carriers* instructs, vicious insults designed to cause severe distress will be hurled about. But unless such emotionally laden speech carries with it some harm other than its capacity to outrage it is not actionable.

There was a time when the common-law protection for "opinion" or "fair comment" in defamation actions protected only "fair" or "reasonable" opinions. The "fairness" or "reasonableness" of the comment usually was left to the relatively unguided judgment of the jury. *See, e.g.*, R. Sack, *Libel, Slander, and Related Problems*, §IV.3.6 (1980); R. Smolla, *The Law of Defamation*, §6.02 [3] (1986). This practice permitted juries to pass judgment on the "worth" of the speaker's viewpoint, and carried with it the potential for persecution of unpopular views. *See* Hill, 76 Colum. L. Rev. 1205, 1233 (1984).

When this Court stated in *Gertz*, 418 U.S. at 339, that "[u]nder the First Amendment there is no such thing as a false idea," it emancipated the outrageous or unpopular opinion from legal censure. "However pernicious an opinion may seem," the Court wrote, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40.

A harsh or outrageous opinion directed against a public figure will virtually by definition be intentionally or recklessly designed to generate severe emotional distress. Opinions are always "intentional"; they are designed to have an effect. As Justice Holmes instructed: "Every idea is an incitement." *Gitlow v.*

New York, 268 U.S. 652, 673 (1975) (Holmes, J., dissenting).

The use of the Virginia cause of action for emotional distress to punish Flynt for speech that the jury found not to be understood as fact is nothing more than the resuscitation of a cause of action for outrageous opinion. The requirement of Virginia's emotional distress tort that the conduct offend "generally accepted standards of decency or morality,"[6] requires that the judge and jury do what *Gertz* forbids: determine if the publisher's opinion is, in their minds, indecent or immoral. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (striking down a statute that restricted movies on basis of sacrilegious content).

II. THE COURT OF APPEALS MISINTERPRETED THE CENTRAL PRINCIPLES UNDERLYING *NEW YORK TIMES CO. V. SULLIVAN* AND SUCCEEDING CASES.

A. The Court of Appeals Improperly Equated A Publisher's Intent To Cause Emotional Distress With Actual Malice

The Court of Appeals reasoned that because the cause of action for intentional infliction of emotional distress under Virginia law contains a requirement of intentional or reckless misconduct, it already has "built in" a level of fault equivalent to that required in the defamation context by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See Falwell v. Flynt*, 797 F.2d 1270, 1274-76 (4th Cir. 1986). The analysis of the Court of Appeals is superficially seductive. The

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[6] *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

imposition of the actual malice standard in public figure defamation cases, the court argued, does not change the essence of the defamation tort; it merely raises the minimum threshold of fault. *Id.* at 1275. So too, the court reasoned, the First Amendment should not be employed to alter the essential elements of the emotional distress tort, but rather should merely require a minimum threshold of fault equivalent to that which would be required in the defamation context. *Id.* Since the record supported the conclusion that the publisher, Flynt, acted intentionally or recklessly to inflict emotional distress in publishing the ad parody, *id.* at 1276-77, Reverend Falwell had, according to the court, proved fault sufficient to satisfy first amendment requirements. *Id. Contra, Blatty v. New York Times Co.*, 42 Cal.3d 1033, 232 Cal. Rptr. 542, 551, 728 P.2d 1177, 1186 (1986) ("Indeed, in . . . [*New York Times Co. v. Sullivan*] the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell court misses this crucial point and as a result cannot be followed.").

The fallacy of the lower court's logic is its assumption that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. In effect, the lower court has equated common-law concepts of malice, i.e. ill will, spite, or a desire to injure, with constitutional actual malice, i.e. knowing or reckless falsity. Yet it is self-evident that these different kinds of intent are not the same; proof that speech is published with common-law malice is not enough to satisfy the *New York Times* actual malice standard. *See, e.g., Dun &*

Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 754 (1985); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 n.3 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964). The term actual malice as used in *New York Times* is nonsensical when applied mechanically to the emotional distress claim in this lawsuit.

B. The Decision of the Court of Appeals is Contrary to the Assumption of Risk and Counterspeech Rationales of Gertz v. Robert Welch, Inc.

Two central rationales supporting this Court's current defamation rules apply well to emotional distress suits predicated upon attacks on public figures. The first is assumption of risk. In *Gertz* the Court held that one who enters the public arena must accept an increased exposure to defamation as part of the price of fame and influence, 418 U.S. at 345, largely reflecting the common sense dictum that if you can't stand the heat, get out of the kitchen. If this first amendment principle requires that public figures assume some enhanced risks of being lied about, then surely it applies with even more force to the increased risk of being subjected to emotionally distressing verbal attacks.

In a pluralistic society diverse enough to count both Jerry Falwell and Larry Flynt in its constellation of public figures, it is inevitable that prominent individuals will occasionally be subjected to unwanted and severe emotional distress. To be attacked with intensity is never pleasant, but it is a risk that the first amendment requires Reverend Falwell to assume as part of the price of his political and religious ministry. As Professor Magruder noted long ago, "Against a large part of the frictions and irritations and clashing

of temperament incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be . . . ; upon the contrary, it would be unfortunate if the law closed all safety valves through which irascible tempers might legally blow off steam." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035, 1053 (1936). Professor Magruder was writing about the sound management of the tort system, but fifty years later his words have taken on a constitutional dimension. *Gertz* teaches that there is an assumption of risk component to the First Amendment. This assumption of risk is an essential element of a pluralistic, robust, and open culture. *See* R. Smolla, *Suing the Press* 257 (1986). In the words of Judge Cardozo, "The timorous may stay at home." *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

The second rationale articulated in *Gertz* is the counterspeech principle. Public officials and public figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed; their very prominence insures some degree of access to the media, permitting them to correct the lie with counterspeech. 418 U.S. at 344. If access to the media as a means of self-help justifies substantial first amendment protection for defamatory speech, it is all the more a justification for constitutional protection of speech that has merely inflicted emotional injury. No matter what the technical name given to the cause of action, the common law has always been extraordinarily wary of permitting recovery for name-calling, insults, epithets, and verbal abuse, not merely because of the assumption of risk principle, but on

the secondary rationale that such language reflects as negatively on the speaker as on the victim. *See Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966). The modern first amendment counterpart to this wisdom is that a public figure subjected to an outrageous attack may be very well able to turn the tables on his attacker by using his own access to the media to display his outrage.

This case vividly illustrates the power of such counterspeech. Exercising his own first amendment prerogatives, Reverend Falwell launched an impressive counter-attack against Flynt and Hustler. Falwell's Moral Majority, Inc., sent out two mailings over his signature. One was a mailing to 500,000 "rank-and-file" members, which described the Hustler parody and asked for contributions to help Falwell "defend his mother's memory." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986). A second mailing of 26,900 to "major donors" enclosed a copy of the parody itself, with eight of the most offensive words blacked out. *Id.* A third mailing signed by Falwell, under the auspices of the Old Time Gospel Hour, was sent to 750,000 persons. *Id.* Falwell also used his television program to discuss the parody and counterattack Flynt, displaying the ad on nationwide television. *Id.* Within thirty days of the mailings, the Moral Majority received $45,000, and the Old Time Gospel Hour received $672,000. *Id.* Falwell used his access to the media to attack Flynt with specific reference to the parody, as well as for a more generalized attack on pornography. These attacks did not mince words. Falwell wrote, for example:

> Now pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy plague. . . . And there, in my opinion, is clear proof that the billion dollar sex industry, of which Larry Flynt is a self-declared leader, is preying on innocent, impressionable children to feed the lusts of depraved adults. For those porno peddlers, it appears that lust and greed have replaced decency and morality.

Id. at 1154 n.7.

This counterattack by Falwell is precisely the sort of self-help remedy that the Court contemplated in *Gertz*. Falwell used the media to "counter the distress" by bluntly and colorfully attacking Flynt. That attack was financially lucrative for Falwell, and it served as a useful device for using his own speech to further his ideological positions. This is exactly the sort of response that the First Amendment is intended to encourage. The salvos between Flynt and Falwell give true meaning to the ideal of wide-open and robust debate. Nothing could be more antithetical to first amendment values than to give to either side the option of invoking the heavy machinery of the state tort system to exact compensation and punitive damages for the hurt feelings that may inevitably accompany these rough exchanges.

III. PUNISHMENT OF SPEECH BECAUSE IT IS INTENDED TO CAUSE EMOTIONAL DISTRESS THREATENS THE COUNTRY'S LONG TRADITION OF PARODY, SATIRE, AND EDITORIAL COMMENT

It is easy to be repulsed and offended by the speech under attack in this case. The words published by Hustler have been described by Judge Wilkinson as a "base parody" that is "unworthy" of the grand

American tradition of public satire. *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing *en banc*). One "base parody", however, does not justify the creation of a formidable legal theory of liability so broad and undefined that it threatens satiric and editorial commentary of all kinds.[7]

The use of satire, criticism, and comment in public debate has a long and established tradition in this country. *See Falwell v. Flynt*, 805 F.2d at 487 (Wilkinson, J., dissenting from denial of rehearing *en banc*). From Phillip Freneau's *National Gazette*, through H. L. Mencken, Sinclair Lewis, and the muckrakers of the early twentieth century, to the modern day editorial page writer or cartoonist, satirists and editors have criticized, excoriated, and vilified public figures since the ratification of our Constitution two hundred years ago. Sometimes their criticisms have been justified, sometimes not. But through it all, this Court

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[7] The threat is by no means limited to commentary, but may also extend to more traditional forms of reporting. In the political arena, for example, it is common for the press to report on competing candidates who make vituperous comments about their opponents. Historically, the courts have been loathe to permit such political controversies to serve as the basis for defamation actions on the theory that: "Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to [policticians]. . . . Whatever is added to the field of libel is taken from the field of free debate." *Sweeny v. Patteson*, 128 F.2d 457, 458 (D.C. Cir. 1942). *See generally* R. Sack, *Libel Slander and Related Problems* 160-61 (1980). If a politician is no longer required to prove publication of a known or reckless defamatory falsehood, and instead may recover simply on a showing of intent to cause him emotional distress, the values protected by *New York Times* and its progeny will be severly undermined.

and those who shape our legal doctrine have recognized that we must take the bad with the good if we are to maintain the vigorous exchange of viewpoints so fundamental to our democracy.[8]

Judge Wilkinson pointed out in his dissent from the denial of a rehearing *en banc*:

> Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air. While Hustler's base parody is unworthy of this or any tradition, the precedent created by the cause of action against this defendant may one day come to stifle the finer forms of this genre.

Falwell v. Flynt, 805 F.2d at 487.

Satire is sometimes effective because it is shocking to mainstream cultural sensibilities. The writer's very purpose may be to outrage—to incite anger, revulsion,

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[8] As James Madison explained:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding proper fruits."

Quoted in Stephens v. Thieriot, 13 Med.L.Rep. (BNA) 2143, 2147-48 (Cal. Ct. App. 1987); *see also* F. Mott *Jefferson and the Press* 38-43 (La. State U. Press 1943).

and controversy. *See* Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B. U. L. Rev. 923, 924-26 (1985). The "bite" of satire is precisely what supplies its potency. *Id.* at 924. Thomas Nast, perhaps America's premier political cartoonist, explained: "I try to hit the enemy between the eyes and knock him down." S. Hess & M. Kaplan, *The Ungentlemenly Art: A History of American Political Cartoons* 93 (Revised Ed. 1975).[9]

One unavoidable consequence of the emotive power of satire is that it often may carry more potential to inflict pain than other genres of speech. However, it has never been part of our first amendment jurisprudence to penalize speech simply because it is effective.

Nor should our first amendment doctrine attempt to chill the exercise of free expression by the unorthodox or unpopular speaker. Yet the controlling operative standard for the emotional distress tort does precisely that; use of the amorphous and fluid phrase "generally accepted standards of decency and morality" invites a jury to impose liability because of its distaste for the publisher or his views, rather than for any concrete harm caused by what is published. Consider, for example, an editorial cartoon depicting President Reagan in an S.S. uniform goosestepping his way through Germany's Bitburg Cemetary, or Gary Trudeau's recent lampoon in Doonesbury of Reverend Pat Robertson obtaining divine guidance in charting his presidential cam-

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[9] Nast's cartoons, published in Harper's Weekly, are generally credited with exposing and precipitating the downfall of William Marcy "Boss" Tweed and his notorious Tammany Hall ring. *See* S. Hess & M. Kaplan, *The Ungentlemenly Art: A History of American Political Cartoons* 93-96 (Revised Ed. 1975).

paign. Do these cartoons offend generally accepted standards of decency or morality? Amicus Richmond Newspapers, Inc. refused to run the Doonesbury cartoons on Reverend Robertson, because of a belief that they would be "extremely offensive to thousands of . . . readers." Richmond Times-Dispatch, Sept. 17, 1986, at B-1. Many others, including amicus Free Lance-Star, published Trudeau's work, *id.*, but would they have done so had they faced the possibility of an enormous money judgment because the cartoons upset Reverend Robertson?

The famous statement in *New York Times Co. v. Sullivan* espousing a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open" was not a mere slogan. 376 U.S. at 270. The words "uninhibited" and "wide-open" gather their force when they are extended to protect speech at the fringes, speech that is indecorous and irreverent. No First Amendment would be necessary if all American speech were polite, genteel, and restrained. But as the Court in *New York Times* emphasized, our national character is more robust; our marketplace of speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*

The satiric attack on Reverend Falwell was couched in a form admittedly outside conventional mores. That, however, cannot be enough to diminish its first amendment protection. For if the attack is not otherwise punishable—if it is not legally obscene, if it does not contain defamatory lies, if it does not pose a clear and present danger of violence—then it may not be proscribed and punished merely because it is unconventional, unorthodox, or distressing. As this Court put it in *West Virginia State Board of Education v. Barnette*, 319 U.S.

624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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APPENDIX

Appendix A

Description of Amici

Richmond Newspapers, Inc. is a Virginia corporation that publishes a morning newspaper, the *Richmond Times-Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation of 230,878), which are distributed in twenty-one cities and seventy-two counties throughout the Commonwealth of Virginia.

The Free Lance-Star Publishing Co. of Fredericksburg, Va. is a Virginia corporation that publishes an afternoon newspaper, The Free Lance-Star (circulation approximately 35,000), six days each week in Fredericksburg, Virginia and surrounding counties.

The New York Times Company publishes The New York Times, a newspaper with a circulation exceeding one million daily and 1.6 million on Sunday. The Company also publishes 32 smaller city newspapers in ten states (with a combined circulation of approximately 800,000) and a number of nationally distributed magazines, and owns five television stations.

The Times Mirror Company publishes the Los Angeles Times, a newspaper with a circulation of more than 1,127,000 daily and more than 1.4 million on Sunday. Times Mirror publishes eight other newspapers, including Newsday, the Baltimore Sun and Evening Sun, and The Hartford Courant, with a combined Sunday circulation of more than two million copies. The Company also operates book and magazine publishing firms, four television stations, and provides cable television service in 14 states.

Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia. The Association represents the majority of daily (33) and weekly (89) newspapers published in the Commonwealth. These

newspapers have a daily circulation of 2,422,055; a Sunday circulation of 947,411; and a weekly circulation of 636,072.

The American Newspaper Publishers Association is a national organization representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately 90 percent of the total daily and Sunday newspaper circulation and a substantial portion of the weekly newspaper circulation in the United States.

The Magazine Publishers Association is a national trade association including in its membership 207 magazine publishers who publish 813 magazines sold at newsstands and by subscription. The Association's members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations, and pastimes of the American people.

AMICUS CURIAE

BRIEF

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JUN 13 1987

No. 86-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,

Petitioners,

vs.

REVEREND JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF VOLUNTEER LAWYERS FOR THE ARTS, INC., AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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June 12, 1987

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FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE

Volunteer Lawyers for the Arts, Inc. ("VLA") respectfully moves for leave to file the annexed brief amicus curiae. VLA is a not-for-profit organization

which provides legal services and advice to authors and artists concerning various matters including their rights of free expression. Because this appeal raises First Amendment issues of profound concern to authors and artists, VLA seeks leave to file a brief amicus curiae. Petitioners have consented in writing to the filing; Respondent has not replied to our request for consent.

Respectfully submitted,

IRWIN KARP
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Lawyers for the Arts,
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June 12, 1987

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BRIEF OF VOLUNTEER LAWYERS FOR THE ARTS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

Volunteer Lawyers for the Arts, a non-profit organization, counsels authors, artists and dramatists on their legal rights, including their rights of

free expression. VLA believes the decision below poses a grave threat to the constitutional rights of authors and artists to express themselves freely on political and social issues, especially when they resort to satire, parody and humor. Because these First Amendment rights are at stake, VLA submits this brief.

ARGUMENT

THE FIRST AMENDMENT BARS ACTIONS BY PUBLIC FIGURES FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Reverend Falwell sued petitioners because they published a "parody" advertisement, expressing criticism of him, using the format of the Compari advertising campaign and its double-entendre theme, "my First Time." The advertisement, clearly a fictitious burlesque, has Reverend Falwell telling of an "incestuous rendezvous" in an

outhouse with his mother.

The jury rejected Reverend Falwell's libel claim, finding reasonable men would not believe the advertisement presented actual facts about him. The trial court also dismissed his claim for invasion of privacy, but nonetheless upheld a verdict in his favor for intentional infliction of emotional distress, which the Court of Appeals affirmed.

VLA respectfully submits the Court of Appeals erred and its decision should be reversed because the First Amendment bars public figures or officials from maintaining suits for intentional infliction of emotional distress based on published materials, particularly when the text, cartoon or other material is not libelous and does not invade privacy.

1. Permitting public figures or

officials to sue for emotional distress would impose on public debate and expression the very restraints which this Court frequently has held to violate the First Amendment. These include heavy costs of defense; and the uncertainty as to whether a jury would find the expression offended "accepted standards of decencey or morality", or find the author or cartoonist intended, as many do, to cause distress to their targets (a factor the First Amendment bars from consideration in libel suits.)

Here, the uncertainty is all the the greater since the Court of Appeals' decision would impose liability for language that is not libelous or invasive of privacy or obscene. Given this enormous elasticity and ambiguity, "emotional distress" claims inevitably would become -- far more than libel -- a powerful cause of self-censorship, that

"self-imposed restriction of free expression" which undermines First Amendment guarantees. Smith v. California, 361 U.S. 147, 151 (1959).

2. When public figures and officials fail to establish that critical or or satirical material libeled them or invaded their privacy, the States have no constitutionally legitimate interest in redressing claims for emotional distress based on that material. The imperative First Amendment interest in foreclosing the chilling effects on free speech of such claims outweighs any interest States might have in permitting them.

The overwhelming First Amendment interest is apparent, given the enormous potential of emotional distress claims as a tool for juries to penalize unpopular or strident expression. That

restrictive potential is heightened when, as here, the defendants are "foreigners" and plaintiffs are public figures or officials who live, or are popular, in the community.

3. Constitutional license for emotional distress claims by public persons would expose authors, cartoonists, political satirists, publishers, broadcasters, and film companies to a mounting tide of new litigation. Words and phrases of the kind that were held not to be actionable in libel or invasion of privacy suits, could be litigated again under the talisman of "intentional infliction of emotional distress", with even greater prospects of sizeable verdicts (and forced settlements) under the logic of the Court of Appeals decision.

4. The decision below flouts the tradition and history of political and social debate in the United States. As

this Court frequently has stressed -- and Judge Wilkinson's dissenting opinion eloquently demonstrates -- coarse, offensive and abusive language always has been part of the American dialogue on public issues. Even clergymen have attacked others with words that cause severe emotional distress.* Such speech is protected by the First Amendment (i) because that protection is essential to insure free and open debate, and (ii) because of the wide range of taste and differing standards of propriety in our society.

Affirmance of the Court of Appeals decision would require this Court to become the Emily Post of American political and social dialogue. This Court

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* "Unholy Row", TIME, April 6, 1987, pp. 60-67; "Fresh Out of Miracles", NEWSWEEK, May 11, 1987, p. 70; "God's Bullies", Perry Deane Young (Holt, Rinehart and Winston, 1982), pp.197-204.

and Courts of Appeal, would have to consider the First Amendment consequences of an ever-increasing flow of decisions imposing liability on authors and artists who chose -- in criticizing or commenting on public persons -- to employ forms of speech, allusion and metaphor that later proved objectionable to 12 citizens in a community whose tastes they could never possibly appraise, or whose lack of humor or tolerance they might never have anticipated.

5. As Judge Wilkinson correctly noted, our history and political traditions offer other recourse to public figures or officials who are angered or upset by caustic or abusive or just plain unfriendly criticism. They can: respond in the marketplace of ideas; develop a thicker skin; accept the benefit of public sympathy that often flows from scurrilous attack;

wait the short time it usually takes for the attack to be forgotten; and, indeed, put to use the apt advice in The Sermon on the Mount (Matthew 5:39).

6. VLA submits that the teaching of New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny make it plain the First Amendment is a barrier against emotional distress actions by public figures and officials. So too does one of the Amendment's draftsmen:

> "Indeed the abuses of the freedom of the press here have been carried to a length never before known or borne by any civilized nation. But is is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood. And hitherto the public judgment has performed that office with wonderful correctness."
> (Thomas Jefferson 1803; quoted, "The Great Quotations", ed. G. Seldes; Pocket Books, 1967; 391)

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

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REVEREND JERRY FALWELL,
Respondent.

On Writ of *Certiorari* to the United States
Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONERS.

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Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Law & Humanities Institute hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

In the petition for writ of certiorari, in respondent's brief in opposition, and in the briefs of _amici curiae_ previously filed in support of the petition, insufficient attention was given to the ramifications of the decision and opinion of the Court of Appeals below regarding the entitlement of fictional material, including parody, to the constitutional guarantees of speech and press, and regarding the inapplicability of the "actual malice" doctrine to parody or other fiction. Since it appears likely that the parties and other _amici_ will pursue the same course in their briefs on the merits, it is believed that the brief the _amicus curiae_ herein seeks permission to file provides fuller argument and authorities on those constitutional issues, and will be helpful to the Court in reaching a well-considered decision on the merits.

For the foregoing reason, The Law & Humanities Institute respectfully requests that this Motion for leave to File a Brief _Amicus Curiae_ on the merits be granted.

Respectfully submitted,



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June 10, 1987

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Supreme Court of the United States

October Term, 1986

No. 86-1276

HUSTLER MAGAZINE, INC. AND
LARRY C. FLYNT,

Petitioners,

v.

REVEREND JERRY FALWELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF AMICUS CURIAE FOR THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Law and Humanities Institute ("LHI") is a not-for profit foundation concerned with various interrelations between law and literary art. To this end, LHI brings together lawyers, literary critics and creative fiction and poetry writers to discuss common problems and interests.

An important aspect of LHI's work has been to monitor legal developments that may have importance for the free expression of the creative verbal imagination. Thus LHI has sponsored conferences, discussion groups and publications on the subject of defamation and privacy law remedies against fiction writers. It has sought to clarify the role played by New York Times v Sullivan and its progeny in the domain of literary expression.

LHI has increasingly recognized that private tort remedies against fiction writers present, even after Sullivan--and sometimes seemingly with its help--a threat to imaginative, hyperbolic and satiric speech. Its special perspective, which emphasizes fictional as opposed to journalistic speech, has permitted LHI to

track developments among authors and publishers who must tailor their behavior to the perceived threat of eventual tort-based litigation. By the same token, LHI's interest in, and respect for, the dignity of the individual in our society, has given it a balanced perspective in which the risk to private interests is weighed against the chilling effect of these expanding remedies upon literary expression.

LHI views the Fourth Circuit's decision with the utmost concern. For the first time, a valued form of literary art -- parody -- has been exposed to the vagaries of yet another private tort remedy: intentional infliction of emotional distress. That a public figure, incapable of proving either defamation or invasion of privacy, has had a six-figure verdict in his favor

affirmed by a United States Court of Appeals, on a mere showing of emotional distress in encountering a parodic thrust against him, represents an in terrorem expansion of tort law remedies at the expense of the First Amendment values inherent in creative, literary expression.

LHI's concern differs from that of the parties and the other amici in this proceeding. LHI believes that fiction, including parody, must be protected from such threats not only as a form of "opinion", but also purely in its own right. It is also LHI's belief that the imposition of the Sullivan "actual malice" test makes no sense here, where the utterance is admittedly a form of imaginative exaggeration not susceptible to traditional truth/falsehood tests.

Amicus LHI urges the Court to reverse the Fourth Circuit's decision because a public figure's emotional response to a work of fiction and parody directed against him should not, under any circumstances, give rise to a cognizable claim under the constitutional framework of protection afforded by the First Amendment.

SUMMARY OF ARGUMENT

It is the argument of The Law and Humanities Institute that parody and other fictional forms of expression should be absolutely protected from "emotional distress" claims brought by public figures. LHI supports its contention by four underlying propositions of law.

First, literary and artistic forms of expression are entitled to the full protection of the First Amendment's speech guarantees. Over the past four decades, this Court has explicitly extended free speech protection to most forms of literature, art and entertainment, whether or not the specific imaginative utterance involved seemed to be lastingly meritorious or purely "popular". Literature has been accepted, along with journalism, as an essential medium for the communication of information and ideas within a lively and robust political culture.

Second, parody -- the precise genre under attack here -- must be especially valued in First Amendment terms, for its main aim is to provide perspective on the foibles of public officials and public figures. From the beginnings of Western culture, and with considerable emphasis

during the period in which we gained independence and ratified the Constitution, parody sharpened public debate and kept our leaders in focus as human beings rather than saints. Outrage is the essence of this medium of expression which, without its piquant and sometimes hurtful qualities, would be eviscerated as a literary genre.

Third, the relatively recent judge-made tort of intentional infliction of emotional distress has never before by a United States Circuit Court been utilized against parodic speech. Quite apart from First Amendment considerations, the common law of Virginia and of most other states may well be unsupportive of claims based on merely insulting (as opposed to threatening) speech, particularly where, as here, the degree of emotional distress claimed to have been suffered by a

plaintiff is relatively mild. Thus, here, as in New York Times v. Sullivan, 376 U.S. 254 (1964), the Court has a crucial opportunity to scrutinize the tort law's relationship to First Amendment policies, for it is again confronted with a judge-made tort utilized against culturally vital, and traditionally free kinds of speech. And, as in Sullivan, the Court may see the pressing need to delimit the proper use by both state and federal judges of a tort-based action that might otherwise tend to chill critical comment about public officials and figures.

Fourth, the "actual malice" test will not afford protection to fiction and parody writers because such creative speech cannot be measured in terms of truth and falsity. Fiction writers sued in defamation, for example, have already

suffered the irony of seeing Sullivan successfully employed against them by public figures such as the instant plaintiff; in Bindrim v. Mitchell, 155 Cal. App. 3d 61, Ct. of Appeal, Cal., 1979), certiorari denied 444 U.S. 984, (1979), a California appeals court found "knowing falsehood" to have been proven by a mechanical showing that the medium was a novel and thus an intended "lie". So here, it is evident that any parody will consist of knowingly falsified, because fictional, elements. Thus this mode of expression must be absolutely protected, certainly when the suit is filed by a public figure or official, because the value of parody lies precisely in its willful exaggeration of, and departure from, the literal truth. As with other kinds of fiction -- to which extensive protections should flow arguably even if the plaintiff is a

"private" figure, not readily identifiable to most readers -- parody deserves protection for what it is, both an expression of opinion and a unique resource of literary expression.

ARGUMENT

I. Literary and Artistic Forms of Expression are Entitled to the Full Protection of the Speech and Press Guarantees.

At least since the days of Hannegan v. Esquire, 327 U.S. 146 (1946) and Winters v. New York, 333 U.S. 507 (1948), this court has recognized that the protections of free speech are applicable to popular forms of literature, art and entertainment, such as magazines like Esquire and Headquarters Detective, as well as to finer literature and art. In 1952, the exhibition of a fictional type of movie, The Miracle, also was found to

be within the scope of First Amendment protection, Burstyn v. Wilson, 343 U.S. 495. (1952). This protection was confirmed a few years later for a film adaptation of D.H. Lawrence's novel, Lady Chatterley's Lover, in the case of Kingsley International Pictures v. Regents, 360 U.S. 684 (1959), although the film was taken to "advocate adultery." Then, in 1964, an allegedly "obscene" feature film, The Lovers, was declared by this Court to be constitutionally protected on the same day that Henry Miller's novel Tropic of Cancer was held not suppressible as "obscene" because of the protection that the First and Fourteenth Amendment afforded to literary and artistic expression. Jacobellis v. Ohio, 378 U.S. 184 (1964); Grove Press v. Gerstein, 378 U.S. 577 (1964).

"Live" theatrical performances and "go go" dancing also have received the Court's protection, at least where they were not deemed obscene in the constitutional sense. See Schacht v. United States, 398 U.S. 58; California v. Giannini, 395 U.S. 910 (1969); Southeastern Productions v. Conrad, 420 U.S. 546 (1975); Shad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). As the Court said in Winters, supra at p. 510, in refusing to deny constitutional protection to pulp magazines, "The line between the informing and the entertaining is too elusive for the protection of that basic [free press] right."

Alexander Meiklejohn has offered this reason why fictional as well as non-fictional material needs to be understood as protected under the Constitution:

"There are many forms of thought and expression within the range of human communications from which the voter derives knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgement..... The people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'" Meiklejohn, "The First Amendment Is An Absolute," 1961 Sup. Ct. Rev. 245, 256,263 (1961).

II. The Form of Expression Known As Parody Should Be Constitutionally Protected from Censorship by Governmental Act or Private Tort Claim Because of Its Contribution To "Uninhibited, Robust, and Wide-open" Debate on Public Issues.

"Parody" is defined by the Shorter Oxford English Dictionary as: "1. A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them

to ludicrously inappropriate subjects." This genre of written or drawn commentary is closely related to "burlesque," defined by Shorter as: "That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects...." One type of parody or burlesque, the political cartoon, has been a fixture of American journalistic communication since the time of the Revolution. The material in Hustler magazine that formed the basis of respondent Falwell's tort action herein was in the tradition of such political cartoons; it is, concededly, a parody. In essence, parody involves a criticism by ridicule of the persons or the work at which it is aimed. See Yankowich, Parody and Burlesque in the Law of Copyright, 33 Can. Bar Rev. 1130, 1131 (1955).

Aristotle credited Hegemon of Thasos with being "the inventor of parodies." Hegemon won a prize at Athens for his Gigantomachia ("The Battle of the Giants"), which parodied as a defeat the "officially" victorious exploits of the Athenians in Sicily. Other scholars argue for even earlier parodic works. See Yankowich, supra at 1133. The form was perfected in classical times by Aristophanes who parodied the philosopher Socrates in The Clouds and the tragedians Aeschylus and Euripides in The Knights, The Frogs and The Acharnians.

The Romans also cultivated political parody and in Europe, during the Middle Ages, burlesques found their way even into the paintings on church walls; the Scriptures, church offices and the mass became targets of parody. Don Quixote began as a parody on the Spanish novel of

chivalry and ended as one of the most esteemed of literary classics.

In England, all the great poets wrote parodies: Chaucer, Shakespeare, Marston, John Phillips, and, of course, Swift. Among modern English novelists who successfully worked the vein were Fielding, Thackeray, Max Beerbohm and Gilbert a Beckett. In America, there have been Bret Hart, E.B. White, Ogden Nash, James Thurber, S.J. Perlman and many others.

The cartoon that appeared in Hustler was a parody of a well-known ad. As described by the Court of Appeals: "The 'ad parody' which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about

their 'first time'. They mean, their first encounter with Campari Liqueur, but there is a double entendre with a sexual connotation. In the Hustler parody, Falwell [Plaintiff below] is the celebrity in the advertisement. It contains his photograph and the text of an interview which is attributed to him."

Parodies such as the Hustler parody of a Campari ad involving Falwell, have little to do with the communication of "fact," or "truth." They manifestly are of a fictional nature, not meant or likely to be "believed." That the Hustler composition in question evoked "profound repugnance" in some who read it, that it may have been a crude and tasteless use of parody to critize the Campari liquor ad and plaintiff Falwell, that it may have been intended to cause, and did cause, "emotional distress" are

not matters that should work a forfeit of the material's First Amendment value.

It is important to recall that satiric and parodic pamphleteering was a basic element of the literature that accompanied the American Revolution. In addition, extended allegory, sarcasm, and direct vituperation were employed in artistic pampleteering against political and ideological targets. Compared with works of the best English pamphleteers (--who included Milton, Locke, Swift and Defoe--), the American Revolutionary pamphlets were crude and amateurish; this, notwithstanding that even Adams and Jefferson authored some.

Vigor and even verbal violence were common; mud-slinging invective was everywhere. George Washington was depicted as the corrupter of a washerwoman's

daughter; John Hancock as both impotent and the stud of an illegitimate brood; William Drayton as a disappointed office-seeker whose fortune had been ruined by "the nicks of seven and eleven," and Judge Martin Howard, Jr., as a well-known cardsharper. Balin, The Ideological Origins of the American Revolution (1967) at 17. There is little doubt that these depictions of such public figures amounted to, and indeed did cause their subject emotional distress. The best of them displayed a "concentrated fury" comparable to that which "propelled Swift's thoughts and imagination through the intensifying indirections of literary forms." Among the parodists was Tom Paine. (Id. at 18.)

More than 400 political pamphlets bearing on the public issues and public figures involved in the Revolution were

published between 1750 and 1776; by 1783, over 1,500 had appeared. "Explanatory as well as declarative, and expressive of the beliefs, attitudes and motivations as well as the professed goals of those who led and supported the Revolution, the pamphlets were the distinctive literature of the Revolution." (Id at 8.)

The "Poet of the American Revolution," Philip Freneau, earned his title by satirizing the British and Loyalists and commemorating the deeds of The American patriots. But Washington was so distressed by the polemics of "that rascal Freneau" that he asked Jefferson to remove him from his State Department post. Jefferson declined. See Leary, That Rascal Freneau 233-36 (1941).

Just as Washington (who was once depicted as a donkey led by his aide David Humphreys) and Jefferson (who was once depicted as a lecherous beast waiting in his shirttails outside his wife's bedroom, and as a keeper of a slave harem who auctioned his mulatto offspring into slavery) managed to survive the satirical and parodic barbs of the pamphleteers of their day; and just as James Garfield (depicted as an unwed mother in a dress), and Ulysses S. Grant (lambasted as an incompetent drunkard) survived in theirs; so will Jerry Falwell, (depicted as an incestuous drunkard), Vice-President Bush (rendered "a basket-case" by Garry Troudeau's comic strip Doonesbury), Miss America (depicted as having oral sex with her coach, on stage) and former President Nixon (described as a bumbling, would-be seducer of the executed spy Ethel

Rosenberg and as a victim of a public act of sodomy committed by a mythical Uncle Sam, in Robert Coover's novel The Public Burning) survive. For, as Justice William J. Brennan, Jr. said, in Sullivan, 376 U.S. at 270, the great American debate on public issues may "well include vehement, caustic and sometimes unpleasantly sharp attacks".

As shown below at IV, so long as parodic literary attacks have for their targets government, public officials and public figures, they should be immune from censorship whether by government act or private suit. As Circuit Judge Wilkerson remarked in dissenting from the denial of a rehearing en banc below: "Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed."

The parodying of the "high-and-mighty" has been peculiarly characteristic of political discourse in serious and more popular American culture since before the Revolution; not all of it can be so well done that it attains the artistic goal of the genre of parody: to "pour criticism swiftly into an unforgettable mold." Encyclopedia Britannica (14th ed.) Article, Parody, Vol. 17, p. 337.

III. The First Amendment, Other Circuits, and the Major Common Law Opinions, Disallow The Cause of Action for Intentional Infliction of Emotional Distress Where Written Insults Such as Parody Produce Non-Severe and Temporary Emotional Injury.

(a). Plaintiff's Choice of Label Does Not Reduce His Burden Under the First Amendment in Tort-Based Action Concerning Written Parody or Fiction.

By treating this action as essentially one under the common law

alone, the Fourth Circuit not only misapplied the common law unconstitutionally (see, infra, at III (b)) but also brought itself into conflict with the other circuits. As argued in Petitioners' brief herein (at p. 7), the Seventh and Tenth Circuits have insisted that plaintiffs overcome constitutionally imposed burdens when they bring a claim in emotional distress, burdens that go at least as far as the **Sullivan** actual malice test. Indeed, in **Pring** v. **Penthouse International Ltd.**, 695 F. 2d 438 (10th Cir. 1982), **cert. denied** 462 U.S. 1132 (1983), the Tenth Circuit dismissed a claim brought by a private figure against a parody of the Miss America Contest, relying on **Sullivan**, **Greenbelt** v. **Bresler**, 398 U.S. 6 (1970) and **Letter Carriers** v. **Austin**, 418 U.S. 264 (1974). In that action for

defamation as well as intentional infliction of emotional distress, the Tenth Circuit refused to rely on an "actual malice" test (which it found to be inapposite to claims against fiction writers) but rather rejected plaintiff's basic theory that the extreme forms of parody in the "Penthouse" article in fact invaded those tort interests. Relying on language in **Greenbelt** and **Letter Carriers**, **supra**, the **Pring** court found that even a private figure plaintiff suffered no constitutionally cognizable injury from rhetorical hyperbole and imaginative speech. Such fictional and parodistic speech was held simply to be unyielding of any interpretation that it imparted true facts about the plaintiff or anyone else.

If a private figure plaintiff's claim should be dismissed against the

author and publisher of an outrageous but completely fanatastical parody, so clearly a public figure's claim of emotional distress from a fictional medium should be similarly dismissed. As shown **infra**, Section IV (b), a public figure invites calumny and can answer it easily without recourse to the courts. Furthermore, the First Amendment interests in protecting even extreme forms of parodic speech against legal remedy by public officials and figures are at least as great as they are in the case of private figure plaintiffs; indeed these interests have been protected in leading opinions about public officials and figures (per Justice Brennan in **Greenbelt**, **supra**) and about private figures (per Justice Marshall in **Letter Carriers**, **supra**).

(b). Even at Common Law, State Courts Have Privileged Speech Acts That Merely Insult -- as Opposed to Those That Threaten--in Emotional Distress Actions.

The action of intentional infliction of emotional distress is quite new, deriving from a leading California Supreme Court case in 1952 (see infra); as Prosser points out, the "early cases refused all remedy for mental injury, unless it could be brought within the scope of some already recognized tort". Prosser and Keeton, Torts, 5th Edition (1984), at p. 56. To this day, courts recognize the action only rarely for speech alone, and more rarely still when the speech --as here-- involves insult rather than threat. Excluding the special cases of innkeepers, common carriers and public utilities, "there is virtually unanimous agreement that ... ordinary defendants are not liable for

mere insult . . .", **Prosser and Keeton**, **supra** at p. 59.

The policy behind the common law courts' refusal to grant remedies for insulting speech (including parody), absent some special relationship of power or control between the parties, was set out in famous words by Professor Magruder:

> The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language...

Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936), cited centrally in **Prosser and Keeton**, **supra**, p. 59. See Petitioners' Brief, supra at Appendix B-7. There was also considerable skepticism that insulting (as opposed to threatening) words would

lead to severe emotional distress, and the instant case bears this out, for there is no showing here that plaintiff Falwell indeed suffered the kind of "severe" distress that Virginia law requires. **See** **Petitioners' Brief** (Appendix of Fourth Circuit Opinion) at A-10, footnote 4.

Finally, even where the insulting language apparently resulted in the most extreme reaction possible (heart attack producing death), the common law courts still rejected the claim for intentional infliction of emotional distress. **See**, e.g., Slocum v. Food Fair Stores of Florida, 100 So. 2d 396 (Sup. Ct., Fla., 1958). The common law judges have been reluctant to inhibit speech of a merely insulting kind, even apart from First Amendment concerns, whereas the complete social unacceptibility of

outrageous **threats** led them to allow the action if, at least, plaintiff's emotional distress is severe. Thus in the leading case in this field, State Rubbish Collectors v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (Sup. Ct., Cal., 1952), the "absence of social utility" of defendant's repetitive threats, when coupled with implications of physically violent behavior, was held controlling and the action for severe distress allowed. But parody has great "social utility."

IV. The 'Actual Malice' Test Applicable to Libels of Public Figures Should Not Be Applied to Actions For Emotional Distress Caused By Parody Because:

(a) 'Falsity' (or Factual Misstatement) is an Essential Characteristic of Parody; (b) Public Figures, like Officials, Invite Distressing Personal Calumny and Rhetorical Invective, and (c) Application of The "Actual Malice" Test would Work to Undermine the Freedom of Authors and Artists, and their Publishers, Sued By Public Figures.

(a) This Court observed in Sullivan that "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth produced by collision with error'". 376 U.S. 254, 279 n. 19. Although the "falsity" of all fiction, including parody, may not have been in the mind of the author of the Court's opinion, the dictum has signal applicability to the entire realm of artistic expression for, as Picasso said, "All art is a lie." Fictional and artistic works are knowingly "false," that is, they are not "true"--by design of the author and definition of the genre. In consequence, that a parodic composition is published "with knowledge of its falsity" or "reckless disregard of the truth" is not relevant to, and cannot

forfeit, the work's entitlement to constitutional protection.

Until now this court and some others have afforded quasi-constitutional protection to "rhetorical hyperbole" and political and parodic cartoons, directed at public figures, officials and others in ways analogous to the Hustler parody on Falwell, without recourse to the "actual malice" test. See Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Letter Carriers v. Austin, 418 U.S. 264 (1974).

In Yorty v. Chandler, 13 Cal. App. 3d 467 (1970), which is considered the landmark libelous cartoon case, an editorial page cartoon in the Los Angeles Times depicted Los Angeles Mayor Samuel

W. Yorty as ready to be carted off in a strait-jacket. In affirming the dismissal of Yorty's claim for damages, the California Court of Appeals said that even the casual reader would receive the picture as "no more than rhetorical hyperbole, a vigorous expression of opinion...." The Court expressly recognized the extensive use made by political cartoonists of "symbolism, caricature, exaggeration, extravagance, fancy, and make-believe," and that the "genius of a well-conceived political cartoon... to communicate in graphic form a statement of editorial opinion might otherwise require paragraphs of written material to express." See also Loeb v. Globe Newspaper Co., 489 F.Supp. 481 (D. Mass. 1980). Cartoons, being essentially fictional works, have been found not actionable notwithstanding the

viciousness or malice with which the plaintiff was depicted and regardless of the concomitant personal embarrassment or distress he was caused. Such fictional material is not susceptible to evaluation under the "actual malice" criterion established with respect to factual material in New York Times v. Sullivan, supra. See 7 Media L. Rep. (BNA) 1398; 9 Media L. Rep. (BNA) 2540; Miskovsky v. Tulsa Tribune Co., 678 P.2d 242 (Okla. 1983), cert. den. 465 U.S. 1006 (1984); Mullenmeister v. Snap-On Tools Corp., 587 F.Supp. 868 (S.D.N.Y. 1984).

As one commentator has cogently observed: "Some types of writing or speech, by custom or convention, signal to readers or listeners that what is being read or heard is likely to be opinion, not fact" (emphasis supplied).

Kramer, "Drawing Fire: The Proliferation of Libel Suits Against Cartoonists," 5 Cardozo Law Rev. 572, 581 (1986). Compositions so "signaling" opinion include satire (Pring v. Penthouse, Int'l, 695 F.2d 438, supra), as well as cartoons (Loeb v. Globe Newspaper Co., 489 F. Supp. 481, supra); allegorical paintings (Silberman v. Georges, 456 N.Y.S. 2d 395, 1st Dept 1982); humor columns (Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E. 2d 376, 1980) and reviews (Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 2d Cir. 1985).

As petitioner Hustler demonstrates, the doctrine that opinions are absolutely protected forms of expression could be used to provide the proper result in this case (Petition at 13-17), namely a reversal of the substantial damage award

entered against Hustler magazine. However, it is suggested that a better reason for reversing the award is that fictional expression should receive as much constitutional protection as opinion and the truthful expression of fact.

"Ridicule is also unique in that it always involves falsity. To apply the Sullivan tests--tests premised on the speaker's regard for the truthfulness of his statement--to ridicule is plainly ludicrous". Silver, "Libel, the 'Higher Truths' of Art, and the First Amendment," 126 U. Pa. Law Rev. 1065, 1094 (1978)

(b) As Judge Wilkinson (joined by Judges Phillips, Sprouse and Ervin) suggested below, in dissenting from the Circuit Court's denial of rehearing en banc, "those in political life should (n)ever be able to recover damages for no other

reason than hurt feelings or... because critical commentary inflicted upon them a degree of emotional distress," Appendix B4, Petition herein. Were this Court to permit political figures to recover damages from media defendants solely because of "emotional harm", the wholesale circumvention of the constitutional limitations on defamation actions placed on public officials and public figures, by Times v. Sullivan and its progeny, would be authorized. "It surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate." (Id.)

Participants in American public life, including public figures like Jerry Falwell, invite criticism, calumny and derision. This has always been so. This

Court has ruled that such public figures may obtain civil redress only for such expression that is factual in purport, false, defamatory to reputation, and made either with knowledge of its falsity or with reckless disregard for truth. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). The majority below added another limitation to the people's freedom to criticize public figures by holding that such figures may recover heavy civil damages for parodic expression by convincing a jury that parodies caused them emotional distress. In so doing, the majority below opened the barn door to public figures and officials desirous of using the courts to censor and stifle caustic public criticism and discourse. If the holdings below are permitted to stand, that part of this nation's public discourse which is carried on by the mass media as well as

artistic, satirical and parodical forms, -- including political and editorial cartoons -- will be threatened with obliteration. All that would be necessary is for the targets of such literary or artistic expression to demonstrate that their feelings were deliberately hurt, that they were purposely distressed, by the compositions of media defendants. But as Judge Wilkinson observed below: "Political satire and parody aim to distress. This genre of commentary depends upon distortion and discomfiture for its effect....," Appendix B-9, Petition herein.

(c) As indicated, supra, Section III (a), this Court's precedents provide ample doctrine for the reversal and dismissal of claims against rhetorical hyperbole and imaginative speech in the tort areas

of defamation and intentional infliction of emotional distress. There is no need to apply the **Sullivan** "actual malice" test, which seems inapposite to the media of fiction and parody. As valuable literary genres, fiction and parody are defined by their deliberate (i.e., their "knowing") use of falsehood, yet it is through these exaggerations that a heightened reality may be communicated.

As some commentators have observed, the Sullivan test has not entirely achieved its goal of protecting valuable speech domains. Thus Professor Richard Epstein recently suggested the possibility that litigation against the media increased after **Sullivan**, implying "the odd and unfortunate consequence of increasing the expected costs of defamation actions to media defendants, all in the name of protecting freedom of speech," Epstein, "Was N.Y. Times v.

Sullivan Wrong?", 53 U. Chi. L. Rev. 782, 804 (1986). His suggestion is supported in part by data provided in Kaufman, "Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation", unpublished paper of the Libel Resource Defense Fund (1986) at 7 and 30. See also Note, "Defamation in Fiction: The Case For Absolute First Amendment Protection", 29 Am. Univ. L. Rev. 571 (1980).

Whatever the accuracy of these comments, there is reason to fear that fiction and parody can not effectively be protected by the Sullivan rule. Indeed, some courts have supported the claims of public figure plaintiffs, more even than those of private figures, when the alleged tortious medium is fiction. Thus, in the case of Bindrim v. Mitchell, 155 Cal. App. 3d 61, cert. den. 444 U.S. 984

(1979), supra, a California psychotherapist stipulated public figure status in a successful strategy that lent credibility to the view that he was in fact under discussion in defendant's novel, although he was neither named nor predominantly described therein. He alleged, and the court and jury agreed, that any psychotherapist described in a work of fiction set in California must impress many readers as in fact describing him. He then satisfied the Sullivan burden by convincing the court that fiction, by definition, is "knowing falsehood". He won a substantial tort judgment against the author and her publisher, including both actual and punitive damage awards.

Such mechanical uses of the Sullivan test have caused publishers to institute new and complex procedures for "quizzing"

fiction writers before evaluating and accepting otherwise talented expressions of literary ability. See, Note, "Defamation in Fiction", 29 Am. Univ. L. Rev. supra at 577. The extension of the "actual malice" formula to the instant set of facts, even if it would have the merit of reversing the Fourth Circuit's judgment,[1] would create the same paradox, because the establishment of the "actual malice" test would be less protective of parody than of other forms of literary expression. Parody, after all, deliberately distorts. If it cannot do so, it ceases to exist as a viable genre. And if it ceases to exist, then an imaginative and politically valuable medium that dates to the Greeks and --

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[1]. The Fourth Circuit apparently explicitly rejected application of the "actual malice" test to this tort. See Petitioners' Brief, supra, Appendix A-8-9. To this extent only, Amicus LHI agrees with the decision.

in our constitutional culture -- to the founders of this Republic, will cease to delight audiences and to bring needed humility to the renowned among us.

Parody (and fiction more generally) needs First Amendment protection on its own terms. Even the sobriquet "opinion", which may serve to protect some forms of expression, does not adequately describe parody and most other fictional genres. Since the individual interests sought to be protected, as this case demonstrates, are often fairly mild and quite temporary injuries to the plaintiff`s emotions (or, occasionally, his reputation), and since the chilling effect on valued expression by allowing such actions is enormous, tort-based claims against parody (and fiction) need to be barred.

Certainly where a public figure, who traffics in the media and who has concededly not suffered severe emotional distress, seeks to win judgments from the writers of parody, such claims should be dismissed as contrary to the First Amendment principles laid down by this Court.

CONCLUSION

Parody, like other forms of fictional expression should be absolutely protected from emotional distress actions brought by public figures.

The United States Court of Appeals' decision should be reversed lest the use of fictional forms of expression, including parody, to criticize public figures and communicate political and social ideas be left unprotected by the constitutional freedoms of speech and press.

Respectfully submitted,



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AMICUS CURIAE

BRIEF

MOTION FILED
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No. 86-1276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,

Petitioners,

—against—

REVEREND JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, CBS INC., CAPITAL CITIES/ABC, INC., NATIONAL BROADCASTING COMPANY, INC., AND NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.3 of the Rules of this Court, the American Civil Liberties Union Foundation ("ACLU"), the American Civil Liberties Union of Virginia, CBS Inc., Capital Cities/ABC, Inc., National Broadcasting Company, Inc., and the National Association of Broadcasters hereby move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; respondent has denied permission.

The ACLU is a nationwide, non-profit, non-partisan organization of more than 250,000 members dedicated to defending the principles embodied in the Bill of Rights. Foremost among those principles is the right of free expression embodied in the First Amendment. The American Civil Liberties Union of Virginia is the ACLU's statewide affiliate.

CBS Inc., is the owner of television and radio broadcast stations and the operator of national television and radio networks.

Capital Cities/ABC, Inc., through various subsidiaries, operates national television and radio networks, and television and radio stations throughout the country, and publishes newspapers, magazines, and books.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The National Association of Broadcasters is a non-profit, incorporated trade association of more than 4,900 radio stations, 950 television stations, and the major commercial broadcast networks.

Amici have appeared in this Court on innumerable occasions in free speech cases, including appearance by the ACLU in *New York Times v. Sullivan*, 376 U.S. 254 (1964). They seek to do so again because this case directly threatens the free speech values articulated by this Court for more than two decades. In particular, this Court's landmark decision in *Sullivan* will be substantially undermined if the carefully crafted constitutional rules applicable to defamation can be evaded merely by relying on the common law tort of intentional infliction of emotional distress. Moreover, by permitting a finding of liability without any finding of falsehood, the decision below will inevitably have a severe chilling effect on free expression.

Accordingly, Amici respectfully move for leave to file the attached brief *amicus curiae* in order to present the Court with their views on this important free speech question.

Respectfully submitted,

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Interest of Amici Curiae

The interest of Amici is fully set forth in the motion for leave to file this Brief *Amicus Curiae*.

Statement of the Case

Amici adopt the Statement of the Case set forth by Petitioners.

Summary of Argument

This case presents a fundamental departure from an unbroken line of decisions by this Court from *New York Times v. Sullivan*, 376 U.S. 254 (1964), to *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ____, 106 S. Ct. 1558, 89 L. Ed.2d 783 (1986). These decisions hold that discussion and comment about individuals involved in matters of concern or interest to the American people may not give rise to tort liability unless the plaintiff is able to adduce evidence that the publication was false and that it was published with fault. In the case of a public figure like Respondent Reverend Falwell, the degree of fault required is actual malice, that is, that the statement was published with knowledge of falsity or with reckless disregard for its truth or falsity. In this case, the jury found neither falsity nor actual malice.

Despite the failure to meet these requirements, Falwell, a public figure involved in matters of national importance and who regularly engages in debate on public issues involving politics, religion and morality in American life, received a judgment of $200,000 in compensatory and punitive damages for intentional infliction of emotional distress under Virginia law. The jury's award was affirmed by the Court of Appeals for the Fourth Circuit.

The publication in issue is a parody which mocks Reverend Falwell as a hypocrite in a manner which many, including Amici, might well find crude and tasteless. Nevertheless, Amici argue that satiric comment in a public forum may give rise to common law tort liability only if the plaintiff meets the requirements of the First Amendment as set forth in *New York Times v. Sullivan*, *supra*, and its progeny. (Point I).

Moreover, the common law tort of intentional infliction of emotional distress may not be used to circumvent the carefully crafted protections set forth in Sullivan. (Point II).

The judgment below presents a compelling case for reversal since the jury found that the parody did not convey a false statement of fact to readers. Falwell, therefore, failed to meet the first requirement of the First Amendment enunciated in *New York Times v. Sullivan*, *supra*, as to falsity. (Point III).

Nor did this jury find that petitioners published the parody with knowledge of its falsity or with reckless disregard for the truth and thus Falwell failed to meet this second requirement of *New York Times v. Sullivan*. The Court of Appeals misconstrued the *Sullivan* actual malice standard and erroneously held that actual malice could be established by a finding merely that petitioners intended to offend Falwell. (Point IV).

The Court of Appeals decision, if allowed to stand, is likely to stifle editorial writers, political cartoonists, satirists, critics and reporters in all media who regularly contribute to the free flow of information and opinion by writing about, and occasionally mocking, individuals whose feelings might very well be hurt by such criticism. Such self-censorship is not in the public interest, nor is it consistent with our constitutional heritage. As this Court has recognized, "[a] broadly defined freedom of the press assumes the maintenance of our political system and our open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

ARGUMENT

POINT I

SATIRIC COMMENT IS SUBJECT TO THE PROTECTIONS OF THE FIRST AMENDMENT AS SET FORTH IN *NEW YORK TIMES v. SULLIVAN* AND ITS PROGENY

Comment on political and social matters, even where expressed in the form of parody or satire, goes to the heart of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. at 270. Petitioners' attack on respondent's character undoubtedly falls within this latter category. For the reasons set forth in *Sullivan*, it is nonetheless protected by the First Amendment and, unless First Amendment standards are satisfied, cannot be the basis for common law tort liability.

Throughout history, parody and satire have been used as a form of social and political criticism. For instance, in the 15th and 16th centuries, artists such as Hieronymus Bosch (1450-1524) and Hans Holbein (1460-1524) attacked the dominant Church and clergy of the day for their hypocrisy and preoccupation with sin. L. Duboff, *Desk Book of Art Law* 189 (1977). Indeed, at the time of the enactment of the First Amendment, the Founding Fathers themselves were regularly subjected to harshly critical satiric comment. For instance, Thomas Jefferson was depicted in a cartoon as a lecherous beast who maintained a slave harem. V. Dabney, *The Jefferson Scandals: A Rebuttal* 9 (1981). In 19th century America, satiric journals were highly influential; cartoonist Thomas Nast's sharp attacks in Harper's Magazine on Boss Tweed in New York were widely credited as a cause of the downfall of that political boss. S. Heller, *Man Bites Man: Two Decades of Satiric Art* 10-12 (1981).

Satire is rarely gentle criticism; its effect lies in its harsh bite and in its shock value. One expert has written that satiric comment is meant to discuss named individuals in "sharply critical language, including callous, crude or obscene words" intended to shock and disturb the reader. *See* G. Highet, *The Anatomy of Satire* (1962), *quoted in* H. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U.L. Rev. 923, 924 (1985) (hereafter "Satiric Appropriation"). The satire in issue certainly meets this definition. It exposes Falwell to criticism in language which is bound to shock and disturb. Yet, well known religious and political leaders have recently been the subject of regular criticism in the media.[1] Editorial cartoons that appear in daily newspapers throughout the country, such as Oliphant and Bloom County, regularly mock public figures and their stance on public issues. Such commentary is a part of the give and take of public life.

Harsh criticism or personal revelations in the media may undoubtedly hurt or cause embarrassment or even emotional distress. But where, as here, the speech is not proven to be false or published with fault, this Court has wisely and repeatedly placed a higher value on our basic commitment to free expression.

Thus, this Court, and other courts following its lead, have long recognized the value of satiric comment in political discourse. *Papish v. University of Missouri*, 410 U.S. 667 (1973) (First Amendment protects political cartoon illustrating policeman raping the Statue of Liberty); *Winters v. New York*, 333 U.S. 507, 510 (1947) ("The line between the informing and entertaining is too elusive . . . Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine"); *Myers v. Boston Magazine Co.*, 380 Mass. 336, 344-45, 403 N.E.2d 376, 381

1 The cartoons and satiric comments which appeared after the withdrawal of Gary Hart's presidential campaign and which accompanied Reverend Bakker's troubled relationship with his ministry no doubt upset and hurt the feelings of their subjects.

(1980) (First Amendment protects the "ancient lively tradition of criticizing, even lampooning"); *Penthouse International Ltd. v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (poster of nude Walter Mondale could be exhibited in New York City subways despite its offensiveness).

POINT II

FIRST AMENDMENT PROTECTIONS MAY NOT BE CIRCUMVENTED BY INVOKING THE LABEL OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

This case must be recognized for what it really is: an attempt to reduce the holding of *Sullivan* to functional irrelevance. If a defamation plaintiff barred from recovery by *Sullivan* is able to prevail merely by resorting to the label of "intentional infliction of emotional distress," the careful First Amendment balance struck by *Sullivan* and its progeny will be effectively nullified.[2]

The same First Amendment concerns which were so clearly articulated in that case and which led to the constitutionalization of the common law tort of defamation require the same scrutiny of the tort of intentional infliction of emotional distress, since both are addressed to the content of a publication. The holding in *Sullivan* derived from the sound principle that freedom of expression requires "breathing space" if it is to survive and that to allow damage awards based on the content of a publication which is not proven to be false leads to self-censorship which would "dampen the vigor and limit the variety of public debate." *New York Times v. Sullivan*, *supra* at 279.

Indeed, where other new torts arising from media publication have been defined by this Court, strict adherence to the First Amendment protections of *Sullivan* has been required.

2 As the Court noted in *Sullivan*, there is no compulsion in either "precedent [or] policy to give any more weight to the epithet 'libel' than . . . to other 'mere labels' of state law." *New York Times v. Sullivan*, *supra* at 269.

See, e.g., Time, Inc. v. Hill, supra (actual malice required in privacy action); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) (actual malice required). Lower courts and scholars addressing intentional infliction of emotional distress claims are in accord. *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 265 (1984) (an intentional infliction of emotional distress claim was subject to all of the protections applicable to libel actions where the statement in suit appeared in a constitutionality protected publication); *Hutchinson v. Proxmire*, 579 F.2d 1027, 1036 n.16 (7th Cir. 1978) (intentional infliction of emotional distress is subject to same First Amendment protections as defamation claim), *rev'd on other grounds*, 443 U.S. 111 (1979); Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev. 793 (1984) (newly devised torts should not be allowed to skirt the First Amendment protections developed in defamation).

The common law tort of intentional infliction of emotional distress, upon which the verdict in this case was based, has traditionally been applied in very different situations and cannot be use as a surrogate to evade the protections of the First Amendment where the content of a publication is in issue. Typical intentional infliction cases involve overzealous bill collectors or others who engage in outrageous verbal harassment addressed directly to the plaintiff. Prosser and Keeton on Torts § 12, at 54-64 (5th ed. 1984); *Wilkinson v. Downton* [1897] 2 Q.B.D. 57 (a woman was held entitled to damages when falsely told that her husband had been in a terrible accident); Restatement (Second) of Torts § 46, Comments d, e, f (1965).

Here, by contrast, the speech was contained in a mass publication addressed to the public rather than to the respondent personally. This distinction has important constitutional consequences that this Court has recognized in analogous contexts. For example, "fighting words" may be actionable if uttered face-to-face, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), but are constitutionally protected when addressed to a crowd, *Terminiello v. Chicago*, 337 U.S. 1 (1948), since the consequence of suppressing the speech is far more severe in

the latter case for a pluralistic society committed to free and open public debate.

Indeed, even the Court below purported to recognize that unless the "same level of First Amendment protection" were afforded to petitioners on the emotional distress claim as on the libel claim, the intent of *Sullivan* would be "frustrated" and the "type of self-censorship which [*Sullivan*] sought to abolish" would be encouraged. *Falwell v. Flynt*, 797 F.2d 1270, 1274 (4th Cir. 1986). However, the Court below then declined to require Falwell to prove either falsity or actual malice as set forth in the *Sullivan* case. See Points III and IV, *infra*.

The fact that the satiric comment is found to be offensive is not sufficient to supplant the First Amendment requirements of *New York Times v. Sullivan*. Where a satire of the Miss America pageant in Penthouse Magazine was held defamatory by a Wyoming jury, the Tenth Circuit, in reversing, commented

> The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest . . . . The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; . . . or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. *Pring v. Penthouse International*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

The Tenth Circuit recognized that the "gross nature of the article . . . makes an objective analysis of the law difficult, but we do not make a moral judgment as to this magazine. . . ." *Id.* The court then reversed the judgment of a jury which found the satire libelous. An intentional infliction of emotional harm claim based on the same publication was also dismissed. *See also Reader's Digest Assn. v. Superior Court, supra*; *Hutchinson v. Proxmire, supra*.

POINT III

A FINDING OF FALSITY IS A NECESSARY ELEMENT OF TORT LIABILITY

The Court of Appeals below correctly stated that the First Amendment protections held applicable to libel actions against the media were equally applicable to Falwell's intentional infliction of emotional distress claim, but then misconstrued both prongs of the *Sullivan* test made applicable to such actions. Where the jury has found neither falsity nor fault, it is clear that the *Sullivan* test has not been satisfied.

Sullivan changed the basic tenets of the common law of defamation: previously, truth was a defense to be proven by the defendant and, once an unprivileged defamatory statement was found to be false, strict liability for its publication was imposed. Reasoning from the sound premise that free expression must have "breathing space" if it is to survive and that "erroneous statement is inevitable in free debate," the Court changed both of these common law rules. *New York Times v. Sullivan*, *supra* at 279. It held that the First Amendment requires a public official seeking damages for defamation to bear the burden of proving, by clear and convincing evidence, that the statement in suit was false, and that it was published with actual malice defined as "knowledge that is was false and with reckless disregard for whether it was false or not." *New York Times v. Sullivan*, *supra*, at 279-80; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the same burdens were imposed on plaintiffs who are "public figures" and in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that a private individual plaintiff must also prove falsity and some degree of fault, though each state could determine what fault standard ought to apply.

The principle that damages may not be imposed unless the plaintiff is able to establish that the speech is false derives from the Court's concern that truthful speech must not be subject to "self-censorship." If a critic is required to be a guarantor of the

truth of his criticism, he is more likely to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958), *quoted in New York Times v. Sullivan*, *supra*, at 279. So strong is the commitment to protecting true speech that even where a private individual sues for libel on a matter of public concern, the Constitution requires that the balance "tip in favor of protecting true speech" by imposing the same high standard of proof of falsity as is imposed on a public figure. *Philadelphia Newspapers, Inc. v. Hepps*, 89 L. Ed.2d at 793.

Here, the jury found that no statements of fact at all had been made by petitioners about Falwell. Appendix C-1. Accordingly, if no statements of fact were made, *a fortiori*, there were no *false* statements made which could give rise to tort liability.

In this respect, the case should follow the rule of *Greenbelt Cooperative Publ. Assn. v. Bresler*, 398 U.S. 6 (1970), and *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), that "rhetorical hyperbole," the use of a vigorous epithet or a "lusty and imaginative expression of contempt," not understood as a false statement of fact, could not be actionable as a matter of constitutional law. As the court noted succinctly in *Old Dominion*,

> "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." . . . Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. 418 U.S. at 284 (citation omitted).

The jury's finding here that the parody could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated" conclusively establishes that there was no falsity on which to base an award.[3] Appendix C-1.

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3 Governing state law follows the principles of *Old Dominion* and *Greenbelt*. *See Crawford v. United Steelworkers, AFL/CIO*, 230 Va. 217, 335 S.E.2d 828 (1985) ("disgusting, abusive, repulsive" language cannot support tort liability where no false statement of fact is made).

Cases dealing with editorial cartoons or comment are in accord. *See Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (D. Mass. 1980); *Yorty v. Chandler*, 13 Cal. App.3d 467, 91 Cal. Rptr. 709 (1970); *Myers v. Boston Magazine, Inc.*, *supra*; Dorsen, "Satiric Appropriation," *supra* at 929-932. Clearly, the epithet "blackmailer" as in *Greenbelt* or "traitor" as in *Old Dominion* or many of the comments that regularly appear in editorial cartoons may well hurt the feelings of the "targets" and perhaps cause them emotional distress. Indeed, as noted by the Massachussetts Supreme Court in *Myers v. Boston Magazine, Inc.*, *supra*, 380 Mass. at 344-45, 403 N.E.2d at 38, "[f]or a plaintiff who is the victim of ridicule, the forgetting may not be easy." But, as the *Myers* Court appropriately concluded, where the critic "excludes false statements of fact from his arsenal, the Constitution will shield him."

POINT IV

WITHOUT A FINDING OF ACTUAL MALICE THERE CAN BE NO TORT LIABILITY ARISING FROM SPEECH ABOUT A PUBLIC FIGURE

The Court of Appeals decision below also misconstrues the nature of the *Sullivan* requirement that a public figure plaintiff prove actual malice. Under the Fourth Circuit decision, a plaintiff may sustain the actual malice burden merely by proving that a defendant acted intentionally or recklessly without any reference to falsity. The elimination of reference to falsity, however, makes the Fourth Circuit's definition meaningless, for nearly all publications are intentional. Thus, in *Sullivan*, the Court specifically required a finding of intent to publish *falsehoods*. Moreover, under this Court's prior rulings, an intent to offend is not sufficient to impose liability.

A. Actual Malice Requires a Finding of Intent to Harm through Falsehood

The Fourth Circuit's redefinition of "actual malice" ignores the body of law developed by this and lower courts since 1964 when *Sullivan* first enunciated the actual malice standard. It

has consistently been held that actual malice refers to a defendant's state of mind *as to the truth of his speech*. In *Garrison v. Louisiana*, *supra* at 74, the Court stated that actual malice required a finding of "high degree of awareness of . . . probable falsity." In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the Court held that "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *See also Philadelphia Newspapers, Inc. v. Hepps*, 89 L. Ed.2d at 797 (Stevens, J., dissenting) ("For [the actual malice] standard to be met, the publisher must come close to wilfully blinding itself to the falsity of its utterance").

In a case directly on point, this Court held in *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam), that it was reversible error to instruct a jury in a manner which might "allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm *through falsehood*" (emphasis added). *See also Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967). This is the very error made by the courts below. The jury may very well have concluded that petitioners published the parody in suit intentionally; there was evidence that petitioners intended to attack Falwell. What the jury could not have found, however, was that petitioners intended to attack Falwell *through falsehood*, since, as set forth in Point I, *supra*, it found that no falsehood had been published.[4]

Moreover, this Court has warned that liability based on "defendant's hatred, ill-will or desire to injure [is] 'clearly impermissible' " absent adherence to the requirements of *New York Times. Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, *supra* at 281.

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4 Indeed, the jury questionnaire shows that the jury did not even answer the questions relating to constitutional actual malice but merely answered "yes" to the question as to whether petitioners "intentionally inflicted emotional distress upon plaintiff." Appendix C-2.

B. Intent to Offend is Not Sufficient to Meet the Actual Malice Standard

Clearly, the jury was allowed to impose liability upon its finding of intentional publication of "offensive" material—that is, liability could rest on an intention to offend and not, as required by this Court's decisions, an intention to harm through falsehood.[5] As the Court warned in *Garrison v. Louisiana*, *supra*, at 73-74, where liability is based on

> an intent merely to inflict harm, rather than an intent to inflict harm through a falsehood, "it becomes a hazardous matter to speak out against a popular politician . . . ." Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." (citation omitted).

If the Fourth Circuit's interpretation of the actual malice rule is upheld, much criticism which is intended to affect public debate would be potentially actionable, including direct criticism of public figures. As a result, critics would be forced to express only the mildest views in tame and inoffensive language or run the risk of a jury finding of an intent to offend. For that reason, liability based on speech which merely offends its subject, even intentionally so, is constitutionally impermissable. *Street v. New York*, 394 U.S. 576, 592 (1969) (Constitution protects speech which is "offensive" to some); *Cohen v. California*, 403 U.S. 15, 25 (1970) ("state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us . . ."); *Penthouse International v. Koch*, *supra* at 1350. ("Even speech that is arguably in bad taste, so long as it does not cross the border into obscenity, enjoys the same constitutional protection as the most enlightened political discourse").

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5 Applicable state law requires a finding that the publication in suit "offends generally accepted standards of decency or morality." *Falwell v. Flynt*, *supra* at 1275 n.4.

Moreover, where intent to offend is equated with "actual malice," this Court's holdings that spite, ill-will, or hatred may not establish actual malice are bypassed. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 754 (1985); *Greenbelt Coop. Pub. Assn.*, *supra* at 10 n.3.

Where, as in this case, the jury finds not falsity but merely intent to offend, the balance should tip even more strongly in favor of protection. The subjective standard of offensiveness invites juries to punish unpopular views or attacks on popular personalities. *Cohen v. California*, *supra* at 26. Rather than subject such comment to this uncertainty, this Court has wisely limited tort liability to those cases where falsity has been found and where the publisher knew of the falsity or recklessly disregarded it.

From the earliest days of our constitutional history, it has been recognized that the liberty of the press

> is often carried to excess; that it has sometimes degenerated to licentiousness . . . but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. VI Writings of James Madison, 1790-1802, at 333-37 (Hunt ed. 1906), *quoted in Garrison v. Louisiana*, *supra*, at 87 (Appendix to opinion of Douglas, J., concurring).

In no area of public life is the debate so heated, so deeply felt, and often so strongly expressed, as in the area of religion and morality. In *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), the Court observed that exaggeration, false statement, and vilification of prominent men of the church was a common occurrence in public debate but that "in spite of the probability of excesses and abuses, these liberties [of free speech] are, in

the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Amici have no quarrel with Falwell's argument that the publication in suit here is crude and tasteless. Absent a false statement of fact knowingly or recklessly published, however, no action for damages may lie and Falwell must be content with his ability to speak out publicly in opposition to such attack upon him. There is no question here that he has done so prominently, effectively and in strong and inflammatory language of his own. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).[6]

Indeed, the ability of public figures to counter attacks on them in the public arena is one of the reasons given by this Court for imposing the special constitutional burdens of proof upon them. In *Gertz v. Robert Welch, Inc.*, *supra* at 334, the Court commented that the "first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." Rules which encourage more speech rather than lawsuits are in keeping with one of the fundamental principles of our democracy. As Justice Brandeis commented in *Whitney v. California*, 274 U.S. 357, 377 (1926) (concurring opinion), "[i]f there be time to expose through discussion the falsehood and fallacies, to avert evil by the process of education, the remedy to be applied is more speech, not enforced silence." Where, as here, the speech in question has not been found by the jury to be false, there is even stronger reason to limit the public figure plaintiff to his or her remedy in the court of public opinion.

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6 Falwell supporters mailed over one million copies of the parody to potential contributors in an appeal for funds. The mailings attack petitioners as a "filthy plague" and "porno peddlers" for whom "lust and greed have replaced decency and morality." 796 F.2d at 1154 n.7.

Conclusion

For the reasons stated herein, amici respectfully request that this Court reverse the judgment of the court below.

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AMICUS CURIAE

BRIEF

No. 86-1278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,

Petitioners,

v.

REVEREND JERRY FALWELL,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

MOTION AND BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF MAGAZINE EDITORS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE NEWSPAPER GUILD, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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to the United States Court of Appeals
for the Fourth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF MAGAZINE EDITORS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE NEWSPAPER GUILD, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF PETITIONERS

The Reporters Committee for Freedom of the Press, The American Society of Magazine Editors, The American Society of Newspaper Editors, The Newspaper Guild, and the Radio-Television News Directors Association, as amici curiae in the accompanying proposed brief, hereby move the Court, pursuant to Rule 36.3 of the

Rules of the Supreme Court of the United States, for leave to file the proposed brief amicus curiae in support of the Petitioners in the instant case.

The grounds for this motion are that the amici, having a direct and immediate concern regarding limitations on expressions of opinion protected by the First Amendment, wish to file the attached proposed brief and have obtained written consent from the Petitioners, Hustler Magazine, Inc. and Larry C. Flynt, which has been filed with the Clerk of this Court. Amici have also requested written consent from Respondent, but consent was refused.

Because of the serious First Amendment implications of this case, particularly with respect to the protection of parody as an essential form of social and political commentary, amici submit that the points raised in the accompanying proposed brief would be helpful to the Court's consideration of the case.

For the foregoing reasons, amici curiae respectfully request that this Motion for Leave to File Brief Amici Curiae be granted.

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INTEREST OF AMICI CURIAE

This case presents a fundamental question of First Amendment law: Is the expression of an opinion, in this case through satire and parody, absolutely protected under the Constitution? Or can

a prominent individual, who is unable to prove that he has been libeled, nevertheless recover damages for "emotional distress" he claims to suffer as a result of a "spoof" of a very public aspect of his personality?

The news organizations filing this brief are not parties to this action, but they have a vital interest in the outcome. Specifically, they are concerned about the dangerous and chilling effect the decision below, if allowed to stand, will have on editorialists, cartoonists, commentators and comedians -- in fact all those in the business of expressing their opinion about public figures. The award of damages for "hurt feelings" resulting from satirical commentary is often a vehicle for the suppression of unpopular or offensive ideas. This is intolerable, for the fundamental purpose of the First Amendment is to protect even the most ab-

horrent of ideas.

Amici are not making a literary or ethical judgment about the Hustler material in question here. Their position is simply that Hustler's pungent -- and, to many, repugnant -- satire has already been judicially determined to be opinion about a public figure, and such opinion, whatever its form, tastefulness, or intended offensiveness, is absolutely protected by the First Amendment. Otherwise, a wide range of criticism of public figures is in grave danger of being curtailed through, and from fear of, further legal actions based on a common law tort never intended for that purpose.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in

virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The American Society of Magazine Editors has 450 members who are chief and senior editors of consumer, trade and farm magazines across the United States.

The American Society of Newspaper Editors is a nation wide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The Newspaper Guild is a trade union representing some 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada and Puerto Rico. It has been ac-

tively involved in protecting the First Amendment rights of its members and all Americans.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has over 2,500 members who gather, edit and disseminate news and other public affairs information carried by the national networks, local radio and television broadcast stations and cable television systems throughout the nation.

Amici are actively involved in defending the First Amendment rights of the media and take great interest in cases where these rights are in jeopardy. One of the most essential rights of the free press is the right to criticize those voluntarily in the public spotlight.

This includes responsible, factually based criticism, but further extends to criticism which is sarcastic and

satirical. Speech which falls within the latter category, particularly when it focuses on the very viewpoints the Respondent so vehemently advocates, must be held to fall within the absolute protection of the First Amendment.

The amici curiae view the Fourth Circuit's decision as a direct violation of the crucial liberties which are necessary to maintain a free and vigorous press. Without latitude in expression of opinion, the First Amendment becomes a nullity. For these reasons, amici respectfully ask the Court to reverse the decision of the Fourth Circuit.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Petitioners.

SUMMARY OF THE ARGUMENT

This case presents issues which have serious First Amendment implications extending far beyond the facts set forth by Petitioners. The resolution of this case will affect, and perhaps dramatically alter, the protections all publications and broadcasts are afforded under the Constitution. It is not simply the Petitioners, through their ad parody, who will feel the ramifications of the judgment in this case, but, rather all those individuals who make their livelihood through publishing or broadcasting their legally protected expressions of opinion about public figures and personalities.

Petitioners have set out concisely the compelling grounds on which they seek

review of the judgment in this case. The amici support Petitioners' position on the grounds raised therein and respectfully emphasize six points. First, satirical expressions of opinion directly aimed at those voluntarily in the public spotlight must be recognized as a form of free speech and therefore deserving of absolute First Amendment protection.

Second, the purpose and function of the First Amendment is to promote wide and critical debate both about matters of public concern and about public figures. To penalize Petitioners for publishing a satirical expression of opinion about someone voluntarily in the public eye, particularly when that satire focuses on the particular viewpoint the Respondent so strongly advocates -- his own morality -- would destroy the important underpinnings of the First Amendment.

Third, the First Amendment was not designed to protect only favorable comment. If this were so, it would be useless and inoperative. The press has traditionally enjoyed protection of a whole range of commentary, both favorable and unfavorable. The fact that certain criticism of those who have voluntarily chosen the public spotlight is personally assaultive does not steer that criticism out of the protective zone afforded it by the First Amendment. As noted by the late Honorable Learned Hand, "Indeed it is not true that all ridicule or disagreeable comment is actionable; a man must not be too thin skinned or a self important prig." Frank v. NBC, 506 N.Y.2d 869, 872 (1986), quoting Burton v. Crowell Pub. Co., 82 F.2d 154, 155 (2d Cir. 1936).

Extending First Amendment protection to the type of expression at issue here

would not deviate from the fundamental purpose of the First Amendment. Indeed, it would remain consistent with the drafters' intent to promote uninhibited liberty of speech, particularly when it involves public figures and issues. Furthermore, the mode Petitioners have chosen to voice their opinion about Respondent should not alter the level of protection afforded them. Whether through scathing editorial or foolish caricature, the avenue of expression should not be the focus of the debate. It is irrelevant that a particular parody may be offensive to some, for "what is one man's amusement is another's calumny." Polygram Records v. Superior Court, 216 Cal. Rptr. 252, 258, 170 Cal.App.3d 543 (1985). "Denying parodists the opportunity to poke fun at symbols and names which become woven into the fabric of our daily life, would constitute a serious curtailment of a pro-

tected form of expression." L.L. Bean Inc., v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987).

Fourth, even if the court should find that Petitioner's parody is not absolutely protected as opinion, Respondent should only be permitted to recover damages if actual malice can be proven. The rule of New York Times v. Sullivan, 376 U.S. 254 (1964), should be applied to Respondent's emotional distress claim. Allowing Respondent to recover for distress without proof of malice is in effect allowing him to circumvent the carefully developed boundaries of libel law. This is an impermissible expansion, which renders the notion of a free press illusory.

Fifth, because Petitioners' parody was not libelous, Petitioners should not be held responsible for injuries arising from it. Although the jury in this case

found that the Petitioners had not libeled the Respondent, it nevertheless awarded him damages in the amount of $200,000. This damage award has no legal basis, and should not be allowed to stand. The jurors allowed their intuitive feelings of sympathy to outweigh the constitutional freedom to express opinions, whether flattering or cruel. Permitting judges and juries to censure unpopular ideas destroys the very core of the First Amendment: the protection of the advocacy of ideas.

Finally, the Fourth Circuit's ruling, if allowed to stand, will punish not only outlandish commentary about facts which the reader could not possibly take to be true, but ridicule of the truth as well. To permit a public figure to recover on the grounds that he or she suffered "personal pain" amounts to a fine for speaking freely -- a notion rejected by the

framers, who found free speech and press to be essential to a democratic society.

ARGUMENT

I. Satiric Expressions of Opinion Targeted at Individuals Voluntarily in the Public Eye Are Absolutely Protected Under the First Amendment.

As a form of humorous expression, satire has long been respected as an effective form of critical social comment. "Parody is a humorous form of social commentary and literary criticism that dates back as far as Greek antiquity." L.L. Bean Inc., v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir. 1987). As such, commentators from Chaucer to Moliere to Sinclair Lewis, to such contemporary satirists as Herblock of the Washington Post and Garry Trudeau have employed the genre in their business of lampooning those in the public spotlight.

Satire, as defined in Webster's New World Dictionary (2d ed. 1980) is a "literary work in which stupidities, abuses, etc. are held up to ridicule and

contempt." Satire of those individuals who have thrust themselves into the public spotlight must be protected for "public figures may justifiably be considered not only subjects of criticism but even calumny. . .." Salomone v. Macmillan Pub. Co., Inc., 411 N.Y.S.2d 105, 110 (1978).

Criticism of those in the public eye deserves protective coverage under the First Amendment. As this Court has noted, "One of the prerogatives of American citizenship is the right to criticize public men and measures -- and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." Baumgartner v. United States, 322 U.S. 665, 673-74 (1944). Therefore, extending First Amendment protection to parodies of public figures is warranted as a progressive movement outward from the very core of the First Amendment, the advocacy of

ideas. New York Times v. Sullivan, 376 U.S. 254 (1964).

A satirist in the media community is entitled to the basic right of freedom of speech guaranteed by the Constitution. If satire and parody are to provide the powerful vehicle for social criticism that they historically have, this court must reaffirm their value as a protected form of free speech and grant them the broadest possible constitutional protection. As Judge Harvie Wilkinson wrote in his dissenting opinion below, "Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air." Falwell v. Flynt, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting).

II. Permitting Financial Liability for a Parody of the Most Visible Portion of a Public Figure's Personality Thwarts the Fundamental Purposes of the First Amendment.

The protection afforded by the First Amendment was intended, and has been interpreted, to extend most clearly and broadly to comment on public figures and issues of public concern. Roth v. United States, 354 U.S. 476, 484 (1956). Such comment is, ". . . in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'" Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788).

Because Respondent has "thrust himself to the forefront" of the very public and emotional debate over religious belief, and is pervasively known for his outspoken views on human morality, he is a public figure. Gertz v. Welch, 418 U.S. 323 (1974). By zealously advocating moral

purity, he has thrust his own morality into the arena of public debate, inviting attention and comment. Id. His morality has, of his own hand, become an issue of public interest, about which the First Amendment permits uninhibited debate. New York Times v. Sullivan, 376 U.S. 254 (1964). Penalizing Petitioners for commenting publicly on Respondent's morality, however tastelessly, sanctions disregard for the First Amendment and the protection it extends to comment on public figures and issues.

The rationale for protecting comment on public issues is two-pronged. First, unrestricted comment on matters of public interest has been deemed essential to our democratic system of government, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985), because it advances "truth, science, morality and the arts in general,"

as well as responsible government. Letter to Inhabitants of Quebec, 1 J. Cont. Cong. 108.

Second, public figures like Respondent who inject themselves voluntarily into a public controversy have greater responsibility to accept, and are better able to defend themselves against, the comment they invite. Belli v. Berryhill, 11 Media L. Rep (BNA) 1221 (Cal. Ct. App. Nov. 19, 1984).

This two-pronged rationale would extend to any comment directed at Respondent's public activities, but applies with particular force to the parody published by Petitioners, which attacks the very issue Respondent has thrust into the public eye, his morality. Only through uninhibited comment -- positive and negative -- can the public determine how Respondent's teachings should shape their own religious beliefs. Freedom of

discussion must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the issues of their time. Thornhill v. Alabama, 310 U.S. 88, 102 (1939).

Imposing liability on Petitioners thus doubly abridges First Amendment rights: it denies Petitioners' right to publish, and forecloses the public's right to receive comment on an issue of public interest.

Such comment is particularly important where, as here, Respondent is unrestrained by the political process. Respondent is not an elected public official. The offices he holds are privately created and funded and, hence, are immune from the formal democratic electoral process. Public comment is the only means by which society can attempt to influence his conduct. Curtis Publishing

Co. v. Butts, 388 U.S. 130 (1967) (Warren, J., concurring).

Furthermore, Respondent has extensive access to the media, by which he can rebut the comments in the parody. Whitney v. California, 274 U.S. 357, 377 (1926).

Permitting recovery by Respondent thwarts the First Amendment's intent to protect comment on public figures and issues of public concern, abridges the public's right to unrestricted information on public issues, and affords Respondent unprecedented and undue protection from the comments his public activities invite.

III. Precedent Supports Granting First Amendment Protection to Petitioners' Parody, Despite its Editorial Orientation.

Affording constitutional protection to Petitioners' parody is entirely consistent with the First Amendment and the cases interpreting it. As suggested, the parody, however tasteless, falls squarely within the First Amendment's protection for uninhibited comment on issues of public interest.

The purpose of parody, frequently, is to shock. "Since parody seeks to ridicule sacred verities and prevailing mores, it inevitably offends others, as evinced by the shock which Chaucer's Canterbury Tales and Voltaire's Candide provoked among their contemporaries." L.L. Bean, Inc., v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir. 1987).

The parody's editorial orientation does not rob it of the First Amendment protection to which it is entitled. Con-

stitutional protection does not turn on the "truth, popularity or social utility of the ideas and beliefs" advanced. New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (quoting NAACP v. Button, 371 U.S. 415, 445 (1962)). First Amendment standards are not adjusted to a particular type of publication or a particular subject matter. Pring v. Penthouse International, Ltd., 695 F.2d. 438, 443 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

First Amendment protection is not limited to benign comment or favorable review, to statements or positions that are accepted, decent and popular, that are constructive or have some redeeming element, or that do not deviate from community standards or prevailing religious or moral standards. Id. "The first amendment . . . does not warrant inquiry into 'measures of distress or offensiveness,

depending on the reader, listener or viewer.'" L.L. Bean, Inc., v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987), (quoting United States v. Guarino, 727 F.2d 864, 867 (1st Cir. 1984) (en banc)).

On the contrary, the First Amendment's protective umbrella covers a vast spectrum of unfavorable comment, including views widely divergent from prevailing community standards or "repugnant in the extreme," Pring, supra, 695 F.2d at 443; NAACP v. Button, 371 U.S. 415 (1962) and Terminiello v. Chicago, 337 U.S. 1 (1948) (vigorous and provocative advocacy); Gertz v. Welch, 418 U.S. 323 (1974) and Button (falsehoods); New York Times v. Sullivan, 376 U.S. 254 (1964) (harsh and abusive criticism); Bridges v. California, 314 U.S. 252 (1941) and Button, (information of questionable social value).

Affording First Amendment protection to Petitioners' parody requires neither a break with precedent nor an unwarranted expansion of freedom of speech and of the press. "Parody is often offensive, it is nevertheless 'deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism.'" L.L. Bean Inc., v. Drake Publishers, Inc., 811 F.2d 26, 33 (1st Cir. 1987), (quoting Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), cert. denied, 379 U.S. 822 (1964)). Therefore, such protection preserves the uninhibited debate on public issues to which this country is profoundly committed.

A. Petitioners' Parody is an Expression of Opinion. As Such, It is Protected Absolutely by the First Amendment.

The challenged parody satirized a liqueur advertising campaign, and through it Respondent's teachings on human morality, by recounting a fictitious conversa-

tion in which Respondent supposedly spoke of his "first time." The parody was accompanied by two disclaimers instructing the reader not to take it seriously. At the conclusion of the trial in U.S. District Court, the jury found on special verdict that the parody could not be understood as describing actual facts about Respondent or actual events in which he had participated.

Where the parody's explicit message was clearly not factual and was not intended and could not reasonably be understood literally, the parody must be judged for its implicit message, i.e., that Petitioners do not accept Respondent's protestations of his own morality. This implicit message, the only message the parody truly conveyed to its readers, is pure opinion. As such, it cannot give rise to liability.

Opinion is absolutely protected under

the First Amendment. Gertz v. Welch, 418 U.S. 323 (1974). The privilege applies whether the subject of a published opinion is a private or public figure, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985), Restatement (Second) of Torts § 566, comment c (1981), and whether the opinion expressed is favorable or "pernicious." Gertz v. Welch, 418 U.S. 323 (1974).

The rationale for protecting opinion is compelling. Opinion cannot be false; it is neither offered nor interpreted as fact, and thus is not susceptible to verification. Id.; Lewis v. Time, Inc., 710 F.2d 549 (E.D. Cal. 1983). Furthermore, "while opinion pieces may contain defamatory statements, these pieces are unlikely to convey the impression that an imprecise and unverifiable statement is meant to be a statement of fact." McCabe

v. Rattiner, 814 F.2d 839 (1st Cir. 1987). It is, and must be, taken with a literary and legal grain of salt.

Consequently, the appropriate remedy for unfavorable opinion is counter-opinion, not court-awarded damages. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Welch, 418 U.S. 323, 339 (1974). The counter-opinion remedy is particularly appropriate for parties like Respondent who have virtually unlimited access to money, media and vast audiences and can expose the alleged fallacies of unfavorable opinion by publishing or broadcasting a rebuttal.

Imposing liability on Petitioners for publishing their opinions about Respondent robs Petitioners of the absolute protection to which opinion is entitled, and

affords Respondent a judicial remedy where it has been expressly held none is warranted.

B. Petitioners' Parody Does Not Lose Its First Amendment Protection Because the Opinions it Conveys are Couched in Rhetorical Hyperbole.

To convey their opinion of Respondent's fitness to serve as a national moral leader, Petitioners concocted a fictitious conversation in which Respondent supposedly recounted having incestuous relations with his mother. Using such conceded literary excess, or rhetorical hyperbole, Petitioners drew into question Respondent's protestations of his own morality, leaving readers with a clear, if blunt, sense of Petitioners' opinion.

Petitioners did not forfeit their opinion privilege by opting to convey their opinion using rhetorical hyperbole. Critics and editorial writers are permit-

ted to resort to caricature, rhetorical license, even "caustic bombast" to stimulate public reaction. Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376, 381 (Mass. 1980); National Rifle Assn. v. Dayton Newspapers, Inc., 555 F.Supp. 1299 (S.D. Ohio 1983). In the realm of religious faith and political belief, critics may resort to exaggeration and vilification of men who are prominent in the church and state to persuade others to their points of view. Cantwell v. Connecticut, 310 U.S. 296 (1939).

More importantly, First Amendment standards are not adjusted or diluted according to the type of publication or subject matter. Pring, 695 F.2d at 443. Opinion expressed in rhetorical hyperbole is protected to the same extent as conventional opinion -- absolutely -- if a reader cannot infer from it any factual content. Ollman v. Evans, 750 F.2d 970

(D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). Even facially factual statements are protected if they cannot reasonably be understood to be meant literally and seriously and are obviously "mere vituperation and abuse." Restatement (Second) of Torts § 566, comment e (1981).

This protection reflects a national recognition "[t]hat, in spite of the probabilities of excesses and abuses, these liberties are . . . essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Cantwell v. Connecticut, 310 U.S. 296, 310 (1939).

To determine whether the challenged rhetorical hyperbole is free of factual content, and thus protected as opinion, the court must consider the context within which it was published, including the medium and its intended audience, In

formation Control Corp. v. Genesis One, 611 F.2d 781, 784 (9th Cir. 1980), and the social conventions and customs inherent in different types of writing. Ollman, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985).

This contextual analysis requirement recognizes that even a facially defamatory statement may be protected as opinion if the medium in which it appears, and the style in which it is written, is so traditionally hyperbolic and excessive that the intended audience is on alert not to interpret the statement literally. See Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (sports writer's report that pro basketball player Bill Russell "destroyed" Neil Johnston deemed protected); Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass. 1980) (review in annual "Best and

Worst of Boston" feature claiming "worst" sportscaster was enrolled in remedial speaking class deemed protected opinion).

The requirement recognizes as well that even apparent statements of fact may assume the character of opinion, and thus be privileged, when made in public debate, labor disputes, or other circumstances in which the audience may anticipate efforts by the parties to persuade others to their positions by using "epithets, fiery rhetoric or hyperbole." Information Control Corp. v. Genesis One, 611 F.2d 781 (9th Cir. 1980).

Under this circumstantial/contextual approach, the First Amendment's opinion privilege has been held to protect, inter alia, strike literature reprinting Jack London's vivid and scathing definition of a "scab," Letter Carriers v. Austin, 418 U.S. 264 (1974), and a news report quoting a city politician who, at a city

council meeting, called a developer's requests for eased zoning laws "blackmail," Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970).

The opinion privilege extends as well to those hyperbolic statements that cannot be understood as fact because their very content is so outrageous that it could not conceivably be true. Thus, in Pring v. Penthouse, the privilege was held to protect a parody that claimed a Miss America contestant had oral sex on stage with her coach, on national television, while the new Miss America was being crowned. 695 F.2d at 443.

In dismissing the contestant's defamation action, the court wrote: "The charged portions of the story describe something physically impossible in an impossible setting . . . [I]t is simply impossible to believe that a reader would not have understood that the charged por-

tions were pure fantasy and nothing else." 695 F.2d at 443. Where "even the most careless reader" could discern that the parody did not convey fact, the court had no "alternative" than to find the parody protected as opinion under the First Amendment. Id.

The court rejected the contention that the parody's divergence from "prevailing religious or moral standards" necessitated more restrictive analysis. "Although a story may be repugnant in the extreme to an ordinary reader . . . the typical standards and doctrines under the First Amendment must nevertheless be applied. The magazine itself should not have been tried for its moral standards." Id.

To summarize, the First Amendment's opinion privilege extends in three broad circumstances to rhetorical hyperbole that cannot reasonably be understood to

convey fact: where the type of writing, or the medium itself, is so traditionally rife with hyperbole that readers know not to take the words literally; where the circumstances surrounding publication alert the audience to anticipate the use of hyperbole; and where the challenged statement is in itself so outlandish that even the most careless reader can discern it was not intended as a statement of fact.

Petitioners' parody fits squarely into all three circumstances: it was published in a magazine known for its bold editorial bent, and to an audience accustomed to the stinging satire common in that magazine and the entire genre of adult magazines; it was published in the course of an informal social and philosophical debate on human morality, on which Petitioners and Respondent take diametrically opposed views and could be

expected to resort to hyperbole; and its content was so outlandish that no reader could interpret it as fact.

Further, the parody appeared as one of a series of ad parodies, and was accompanied by two disclaimers, one at the bottom of the page that read "Ad Parody -- Not to be Taken Seriously," and one in the table of contents labeling the parody "Fiction; Ad and Personality Parody."

Finally, because Petitioners are as aggressive and outspoken in their political and personal liberalism as Respondent is in his conservatism, readers could anticipate both the philosophical conflict between Petitioners and Respondent and their respective use of rhetorical hyperbole to make known their views. The audience was thus alerted three times that the parody did not convey fact.

Thus, in context, Petitioners' parody

could not reasonably be understood to describe actual events in which Respondent participated. The jury so found. Imposing financial liability on Petitioners for using rhetorical hyperbole to express an opinion that did not, and could not reasonably be understood to, convey fact disregards the absolute protection to which such comment is entitled, to the genuine detriment of editorial writers, commentators, critics and satirists -- and their audiences -- across the nation.

IV. Because Petitioners' Parody is Protected Under the First Amendment, Respondent May Recover Only Upon Proof of Actual Malice.

Petitioners' parody is entitled to absolute protection under the First Amendment as a statement of opinion. Gertz, 418 U.S. 323 (1974). Should the court determine, however, that the opinion privilege does not protect the parody, it must then apply the New York Times actual malice test, which, in conjunction with Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), prohibits public figures from recovering for allegedly defamatory statements absent proof the statements were published with knowing falsity or reckless disregard for truth. New York Times v. Sullivan, 376 U.S. 254 (1964).

The trial court correctly applied the actual malice standard to Respondent's libel claim, dismissing the claim after

the jury found the parody could not be understood to convey fact and, therefore, was not libelous. The court erred, however, in refusing to apply the malice standard to Respondent's emotional distress claim.

This court has declared that statements about public officials are protected from liability unless published with actual malice. "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

The New York Times rule assures authors that their statements are protected

-- that they will not have to pay -- unless they publish with actual malice. Though the rule was articulated in a libel case, its language and, more importantly, its rationale, require its application to all claims arising from allegedly defamatory commentary.

The First Amendment is intended to preserve the free exchange of ideas essential to an informed citizenry and, thus, to our democratic system of government. Its broad freedoms of speech and of the press were designed to prevent not merely the prior censorship of the press, but any action by which the government might inhibit free and general discussion of public matters. Curtis v. Butts, 388 U.S. 130 (1967) (quoting 2 Cooley, Constitutional Limitations 886 (8th ed., Carrington, 1927)). Thus, the First Amendment bars subtle as well as obvious devices by which free press and

speech might be stifled. NAACP v. Claiborne, 458 U.S. 886 (1982).

The New York Times actual malice test gives voice to this prohibition by establishing a threshold requirement for recovery for allegedly defamatory speech. "Anyone claiming to be defamed must show actual malice or go remediless." New York Times v. Sullivan, 376 U.S. 254, 282 (1964) (quoting Coleman v. MacLennan, 78 Kan. 711, 723, 98 P. 281 (1908)).

Permitting Respondent to recover under an emotional distress claim without proving actual malice sanctions evasion of the New York Times threshold requirement, Werner v. Times-Mirror Co., 193 Cal. App. 2d 111 (1961), and endorses press censorship through the very sort of subtle device the First Amendment is designed to prohibit. It allows Respondent to plead around a defective libel claim and recover damages where the

law of defamation permits none, thereby permitting him "to do indirectly what (he) could not do directly." Flynn v. Higham, 149 Cal.App.3d 677, 682 (1983). It imposes liability under a negligence standard that gives insufficient "breathing space" to the First Amendment. Rosenbloom v. Metromedia, 403 U.S. 29, 50 (1971).

More critically, it robs Petitioners of the protective mantle of the actual malice test and the well-established libel defense of opinion, exposing them to liability for heretofore protected statements. The ramifications of such exposure extend far beyond the confines of this case.

A large percentage of all claims for libel, particularly those arising from editorial comment, satire, political cartoon and critical comment, can be recharacterized as claims for intentional

infliction of emotional distress. Because the intentional infliction tort requires only proof of negligence, liability for allegedly defamatory falsehoods will no longer hinge on a finding of actual malice. The recognized defenses of truth, opinion, fair comment and neutral reportage will be rendered ineffective. As a result, libel law as developed with respect to these types of writing will be discarded, leaving vast fields of writing and commentary unprotected.

Penalizing the expression of heretofore protected ideas -- those published without actual malice -- induces "a cautious and restrictive exercise of the constitutionally guarded freedoms of speech and press." Gertz, 418 U.S. 323, 340 (1974). This condemns the press -- and with it, the public it informs -- "to an arid, desiccated recital of the bare facts." Time, Inc. v. Johnston, 448 F.2d

378, 384 (4th Cir. 1971). Fundamentally, this thwarts the First Amendment's primary goal of fostering an informed citizenry by preserving uninhibited debate on issues of public concern. For "whatever is added to the field of libel is taken away from the field of free debate." Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, cert. denied, 317 U.S. 678 (1942).

Permitting Respondent to recover under an emotional distress claim without proving actual malice impermissibly expands the field of libel by discarding its fundamental limitations, thus exposing writers and publishers to liability for statements published in good faith within existing constitutional boundaries. This, in turn, narrows the broad freedoms protected by the First Amendment, and should not be permitted.

V. Because Petitioners' Parody Was Not Libelous, Petitioners Should Not Be Held Liable for Torts Arising From It.

The jury expressly found that Petitioners' parody could not reasonably be understood to convey fact about Respondent. Because the parody contained no fact, it was not libelous, and was thus protected under the First Amendment. Respondent should not be permitted to recover damages for the intentional infliction tort arising out of it.

Plaintiffs may not recover for torts arising out of protected statements or activities. See NAACP v. Claiborne, 458 U.S. 886 (1982); Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978); Mine Workers v. Gibbs, 383 U.S. 715 (1965) (plaintiffs may not recover on intentional interference with business claim arising from picketing protected under First Amendment); and DeJonge v. Oregon, 299 U.S. 353 (1936) (state may not enact law

that punishes constitutionally protected speech). Liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication. Reader's Digest Ass'n. v. Superior Court, 37 Cal.3d 244, 265 (1984). Only those acts that are not protected by the First Amendment can give rise to liability for damages. Space-Tech Industries v. Otto, 10 Media L. Rep. (BNA) 1703 (Hillsborough County Ct. 1984).

In the context of the instant case, this bar on recovery recognizes the incongruity of deeming a statement constitutionally protected for the purposes of libel, then saying it is outrageous enough to justify recovery for intentional infliction of emotional distress. Koch v. Goldway, 607 F.Supp. 223 (C.D. Cal. 1984).

Where tort claims arise from an al-

legedly defamatory statement, and that statement is protected under the First Amendment, the attendant tort claims should be dismissed with the libel claim. See Polygram Records v. Superior Court, 216 Cal. Rptr. 252, 170 Cal. App. 3d 543 (1985) (dismissal of libel claim dispenses with claims for trade libel, intentional infliction of emotional distress, invasion of privacy and intentional interference with business); Reader's Digest Ass'n. v. Superior Court, 37 Cal. 3d 244 (1984) (plaintiff's failure to show a triable issue of fact as to actual malice barred not only his defamation claim, but also his claims for false light invasion of privacy and intentional infliction of emotional distress); and Lewis v. Time, Inc., 710 F.2d 549 (E.D. Cal. 1983) (plaintiff's claims for slander, invasion of privacy and intentional infliction of emotional distress were

"bound up" into claim for libel).

Respondent's claim for intentional infliction of emotional distress should have been dismissed when his libel claim was found defective. It is based on the very publication the jury determined did not convey fact, and should not be permitted independent legal existence.

VI. The Fourth Circuit's Ruling Will Allow Public Figures a Financial Remedy for Hurt Feelings Resulting Not Only From Hyperbolic Expressions of Opinion, but From Truthful Commentary as Well.

The decision of the Fourth Circuit will allow a public figure to recover potentially uncontrolled damages for even a perfectly true statement merely because of hurt feelings. This is an unlawful and unwarranted extension of the law. "This element strikes at the very heart of the First Amendment because, at a bare minimum, the Amendment must protect true speech about political figures." Falwell v. Flynt, 805 F.2d 484, 488 (4th Cir. 1986) (Wilkinson, J., dissenting).

A true statement could well be hurtful. Allowing lawsuits to be brought by those in the public spotlight, simply because of hurt feelings and absent injury to reputation, is completely inconsistent with the Constitution. As this

Court has recognized, under the standards of libel law, a public figure plaintiff must prove a statement was published with actual malice -- either knowledge that the statement was false or reckless disregard for its truth or falsity -- before recovery will be allowed for defamation. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

This protection has been extended to invasion of privacy suits in which truthful "private facts" have been published or broadcast. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967). "The first amendment mandates a constitutional privilege applicable to those torts of invasion of privacy that involve publicity." Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).

This broad privilege is composed of

two distinct yet related privileges: accurate information relating to public figures and matters of public interest. Id. The "public interest privilege," the publication of truthful information which is of legitimate concern to the public, is "not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with exigencies of their period." Id. Furthermore, "Any information disseminated 'for the purpose of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published' is also protected by the privilege." Gilbert v. Medical Economics, 665 F.2d

305, 308 (10th Cir. 1981) citing Restatement (Second) of Torts § 652, comment j (1981)).

Respondent's position as a highly publicized public figure renders his activities matters of great public interest. The issue of his morality, the subject of Petitioners' parody, is frequently the subject of significant public discussion. The court has held that the publication of truthful information which is readily available to the public cannot be punished without proof of actual malice. "We held that once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." Smith v. Daily Mail, 443 U.S. 97, 103 (1979) (citing Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1976)). Therefore, "if a newspaper lawfully obtains truthful information

about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. 97.

Respondent alleges his interest in emotional peace of mind should outweigh the right of free speech. His morality is a newsworthy topic, the free discussion of which clearly outweighs any alleged right of one voluntarily in the public spotlight to be free from ridicule. "While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented." 443 U.S. at 106 (1979) (Rehnquist, J.,

concurring). Because public figures are not entitled to legally protected emotional tranquillity, but the free press is entitled to uninhibited debate on matters of public interest and harsh and abusive criticism, the First Amendment interests must prevail. New York Times v. Sullivan, 376 U.S. 254 (1964), Bridges v. California, 314 U.S. 252 (1941). "Therefore, to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. When these conditions are satisfied, the facts in the publication and inferences reasonably drawn therefrom fall within the ambit of first amendment protection and are privileged." Gilbert v. Medical Economics, 665 F.2d 305, 308 (10th Cir. 1981).

This court has never recognized a

right to emotional tranquillity for highly publicized public figures. Public figures who voluntarily thrust themselves into the public spotlight forsake their "right to be left alone." They must suffer the emotional wounds which are an unavoidable part of public life. "There are, inescapably, emotional scars that accompany political participation." Falwell v. Flynt, 805 F.2d 484, 485 (4th Cir. 1986) (Wilkinson, J., dissenting). Allowing a public figure to recover damages for hurt feelings resulting from truthful commentary, without meeting the strict constitutional standard required of libel and invasion of privacy plaintiffs, guts the Constitution. "If we now allow public figures to recover for true statements because of wounded sensibilities, we have entered a brave new world of First Amendment jurisprudence." 805 F.2d at 488.

Freedom of speech means freedom to laugh at the personalities, images and symbols which permeate our everyday life. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Bridges v. California, 314 U.S. 252, 270 (1941). Without freedom to criticize those individuals who force themselves into the news, a free press becomes a nullity. "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (citing 4 Elliot's Debates on the Federal Constitution (1876), p. 571). This right must be protected even when the laughter results from the truthful scorn of a public figure for "a defense of fair comment must be afforded for honest expression of

opinion based upon privileged, as well as true, statements of fact." New York Times v. Sullivan, 376 U.S. 254, 292 (1964).

As the Fourth Circuit has envisaged the law, public figures who cannot win lawsuits for defamation or invasion of privacy, because they cannot prove "actual malice" may bypass the strict standards laid down by New York Times and its progeny and instead charge that they suffered "extreme emotional distress," subjecting the author to stiff financial fines for expressing his opinion. This was wisely forbidden by the Founders. "They firmly adhered to the proposition that the 'true liberty of the press' permitted 'every man to publish his opinion.'" Curtis Publishing v. Butts, 388 U.S. 130, 150 (1967) (citing Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788)).

Because satire is regarded as a humorous expression of opinion it is absolutely protected under the First Amendment. Gertz v. Welch, 418 U.S. 323 (1974). Therefore, even satire laden with truthful factual content is constitutionally protected. "An assertion that cannot be proved false cannot be held libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." Hotchner v. Castillo-Puch, 551 F.2d 910, 913 (2d Cir.) cert. denied, 434 U.S. 834 (1977).

If the Fourth Circuit's decision is allowed to stand it will swing open the door to a multitude of unworthy litigation. The effect will be to permit judge and jury censorship of satirical expression of opinion in favor of those whom they feel have suffered wounded egos. The court recognized this danger in

Gertz when it warned "the largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." Gertz v. Welch, 418 U.S. 323, 349 (1974). Furthermore, whatever the type of commentary, it is not the duty of the courts to weigh the aesthetic merit of the publication. "Whether the work is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases." University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp., 256 N.Y.S.2d 301, 307 (1965).

Respondent does not have the same

protected privacy interest as a private citizen, particularly with respect to humorous forms of expression of opinion. "The parody and satire to which public figures may be subject does equally apply to private persons." Salomone v. MacMillan Pub. Co., Inc. 411 N.Y.S.2d 105, 110 (1978). By thrusting himself into the public spotlight, he has waived his right to privacy, and by invited attention and comment, has subjected himself to commentary both laudatory and scornful. His emotions must bear the brunt of public discourse, both good and bad. Our society must put a higher value on discussions of issues of public concern than on the personal peace of mind of a self-proclaimed moralist.

CONCLUSION

For the foregoing reasons, amici respectfully urges this Court to reverse the decision of the Fourth Circuit.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC., *et al.*,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC., IN SUPPORT OF PETITIONERS

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REVEREND JERRY FALWELL,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Home Box Office, Inc. ("HBO"), moves this Court pursuant to Rule 36.3 of the Rules of this Court for leave to file a brief amicus curiae.

HBO has a substantial interest in the subject matter of this appeal. The television programs HBO provides to its subscribers frequently contain parodies of public figures. The decision of the Court of Appeals, which allowed Reverend Jerry Falwell to recover damages for

emotional distress provoked by constitutionally protected parody, threatens HBO's continued use of this form of commentary.

Neither Petitioners nor Respondent will adequately represent HBO's interests for several reasons. First, the publication in which the parody appeared is a print publication that used language, imagery, and ideas that are offensive and would not be seen and heard on an HBO program. Because HBO provides television programs that reach more than fifteen million subscribers nationwide, its programming ranges from regularly scheduled children's programs to parodies and satires addressed to a general-interest audience.

Second, HBO has been the target of lawsuits similar to Reverend Falwell's. In these cases, the plaintiffs, facing substantial hurdles to their defamation claims, tried to avoid first amendment barriers by grounding their claims in other tort theories besides defamation. In all cases, these alternative tort theories, including intentional infliction of emotional distress, failed to overcome the first amendment defenses for protected speech. The decision of the Court of Appeals in this case is at odds with the law of defamation that protects the use of parody and satire for social and political commentary.

Finally, if the Court of Appeals decision is allowed to stand, it will inhibit the use of parody and satire by all media—print, radio, and television. This inhibition would deeply undermine first amendment protection for robust and uninhibited public debate. This genre of speech—satire and parody—would be severely, if not completely, limited by speakers' fears of lawsuits based on tort theories that would not otherwise withstand first amendment scrutiny.

HBO urges the Court to grant its motion for leave to file the attached brief amicus curiae.*

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-1278

HUSTLER MAGAZINE, INC., *et al.*,
Petitioners,
v.
REVEREND JERRY FALWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC., IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Home Box Office, Inc. ("HBO"), provides television programming services for a fee to cable television viewers throughout the country.[1] The decision of the Court

[1] HBO distributes its programming services both through cable systems and to individuals with "earth stations" that allow them to receive the services directly from a satellite. HBO services are "scrambled" so that only authorized subscribers who select and pay for a service are able to view them.

of Appeals, *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), awarding damages to Respondent because he was distressed by an irreverent and distasteful parody, is of great concern to HBO. HBO submits this amicus brief to urge the Court to reverse the decision of the Court of Appeals and to affirm that a public figure may not recover damages for hurt feelings provoked by the publication of a constitutionally protected parody.

HBO has an intense interest in the subject matter of this appeal. HBO programs often bitingly satirize public figures. Because HBO provides its programs only to viewers who choose to subscribe to its services, its programs include comedy, parody, and satire that some, particularly the persons satirized, may find embarrassing or offensive. Unlike programs on governmentally licensed broadcast radio and television, HBO distributes its services by cable television and by satellite, media whose defining characteristic is an almost infinite variety of programming choices. Because HBO reaches a market of self-selected viewers, its programs are often not of the "plain vanilla" variety found on broadcast television. Many HBO programs have a stronger flavor—a flavor that some viewers and public figures may sometimes find objectionable.

Not surprisingly, some of the targets of HBO's satires and parodies have been so offended that they have sought legal redress for their damaged feelings. No more surprisingly, given the first amendment limitations on defamation actions, these plaintiffs have been endlessly inventive in devising tort theories under which to state their claims. Two reported examples of these suits highlight the reasons for HBO's direct interest in this case.

In *Polygram Records v. Superior Court*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985), the plaintiff alleged that HBO and others harmed him by showing a parody by the comedian Robin Williams. The parody included

language that some viewers might have found offensive. The plaintiff did not rest on his defamation claim alone, but also alleged a variety of other torts—intentional and negligent infliction of emotional distress, trade libel, invasion of privacy, and intentional and negligent interference with prospective economic advantage—causes of action that have in recent years become increasingly common as plaintiffs' attorneys seek to avoid the substantial hurdles they must overcome if they are to prevail in their defamation claims. Although the trial court overruled the defendants' demurrers, the California Court of Appeals reversed and properly rejected each of the plaintiff's claims because they all sought to recover damages for a constitutionally protected publication.

In *Moreno v. Time Inc.*, 11 Med. L. Rptr. 2196 (N.Y. Sup. Ct. 1985), an entertainer similarly sought to recover from HBO and others for showing a program that parodied him in a fashion that he considered "extremely offensive." *Id.* at 2198. The plaintiff again alleged other causes of action in addition to his defamation claims. The court rejected all of these claims because it held that no portion of the parody was a false statement of fact.

These reported decisions reflect only one side of the satirical content of HBO's programs. More often, HBO's satires and parodies comment on current events and criticize public figures such as politicians, elected officials, and other prominent people. The Respondent in this case, for example, because he owns and operates a television ministry that regularly broadcasts his message to millions of Americans, raises millions of dollars through television appeals, and continuously attempts in a highly publicized manner to influence this country's political process, is a particularly appropriate target for satire.[2]

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[2] Recent programming on HBO's "Not Necessarily the News" has satirized, among others, the activities of President Reagan, Vice President Bush, Lt. Col. Oliver North, and Prime Minister

His current involvement in the Jim Bakker/PTL scandal only further underlines his high public profile and his ability to command the attention of millions.[3]

Satire is a genre with a tradition that reaches back to the comedies of Euripides and the satires of Juvenal. Religious leaders have long been the targets of satire, sometimes by the great writers of an age, such as Chaucer, Rabelais, Moliere, Diderot, and Sinclair Lewis.[4] Its practitioners include the draftsmen of the Constitution and founders of the republic, who both satirized others and were themselves satirized. Satire serves an important function in the "robust debate" to which this Court has consistently given first amendment protection. *See, e.g.*, S. Hess and M. Kaplan, *The Ungentlemanly Art: A History of American Political Cartoons* (1968). Indeed, thoughtful writers often use satire and parody to challenge conventional ideas and to criticize public figures when more "serious" frontal assaults might fail because of official hostility to contrary views or because of the indifference of an audience. *Gulliver's Travels* is a classic example of this use of satire.

The decision of the Court of Appeals erroneously sanctions punishment for satirical speech which, however distasteful and repugnant, deserves constitutional protection.

Thatcher. Not surprisingly, given the prominence sought by television evangelists in both religious and political arenas, HBO programming has satirized Respondent Falwell, Jim and Tammy Bakker, and Pat Robertson.

[3] The Respondent's access to the area of public debate is undoubted. Through his newly achieved access to the PTL network, he reaches fifteen million viewers in over 1800 cable systems, while previously he reached 1.35 million viewers in more than 90 systems through the Liberty Network. *Television and Cable Fact Book* C-37, C-88 (1987).

[4] *See, e.g., The Priest's Tale* and *The Pardoner's Tale* (Chaucer), *The Abbey of Theleme* (Rabelais), *Tartuffe* (Moliere), *la Religieuse* (Diderot), and *Elmer Gantry* (Lewis).

SUMMARY OF ARGUMENT

This Court and other courts have consistently protected even caustic and abrasive speech about public figures from claims of defamation. But in this case the Court of Appeals has allowed a public-figure plaintiff to exploit an alternative tort theory to obtain a result barred to him through a defamation claim. The Court of Appeals' decision not only ignores established first amendment jurisprudence but effectively returns speech to the uncertain protection it received at common law, when the truth or falsity was irrelevant and the wickedness of the speaker and the harshness of the criticism of a public figure were the tests for liability.

HBO asks this Court to reaffirm its commitment to protecting robust and uninhibited discussion about public issues and to ensure that public figures and officials cannot recover damages for parodies or satires about them under alternative tort theories that evade first amendment standards. Only when a speaker knowingly makes false statements of fact about a public figure or has substantial doubt as to the truth of those statements should a trial court or a jury be allowed to punish satirists and parodists. Any other rule of law will only encourage the development of novel, but ultimately duplicative, tort theories that support no substantial societal interest and erode the established safeguards for protected speech.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS PARODY AND SATIRE.

The undeniably distasteful facts of this case might, at first blush, suggest that first amendment protection is not warranted for the speech at issue. The parody here appeared in a decidedly unwholesome publication and used language, imagery, and ideas that most people would consider offensive. This suit by a highly public figure against an unpopular speaker uttering commen-

tary that is not a communication of facts squarely presents an important issue to this Court: Should a public figure be allowed to recover damages for his injured feelings provoked by parody or satire when a jury has specifically found that the defendant has published no false statement of fact? [5]

A. In Defamation Cases the First Amendment Protects Opinion, Parody, Satire, and Related Criticism.

This Court has consistently made clear in defamation cases that, under the first amendment, "[t]here is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). *See also Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (protected status of opinion). Because hyperbole and rhetoric are statements that are not meant to be understood as factual, a defamation claim fails where it seeks redress for hyperbole and similar language. *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) (epithet "scab" not actionable as defamatory); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970) (accusation of "blackmail" not a factual allegation).

Satire and parody are inevitable targets for defamation suits because they aim to be provocative and to challenge established beliefs and mores. But for that very reason they deserve special consideration by courts applying first amendment protections. *L. L. Bean v. Drake Publishers*, 811 F.2d 26 (1st Cir. 1987); *Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of petition for rehearing). The unsavory nature of the parody at issue here should not be allowed to obscure the fact that parody and satire are

[5] The Court, of course, need not address the different societal interest and first amendment issues that might be involved in a purely private dispute between private parties. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

quintessential examples of speech that is both opinion and at the core of the first amendment protection. As Justice Holmes long ago recognized, "Every idea is an incitement," *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Satire and parody are most effective when they "incite" a strong reaction. Satire and parody are thus entitled to the same kind of constitutional protection as opinion and hyperbole. *See Papish v. University of Missouri*, 410 U.S. 667 (1973) (first amendment protects author of cartoon parody of policeman).

If public figures are encouraged to resort to the courts to redress alleged wrongs at the hands of satirists and parodists, it will be at the expense of the proper forum for airing their grievances, the arena of public opinion.[6] *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 344 (availability of public arena for response by public figures). The events of recent weeks surrounding the fall of the Reverend Jim Bakker of the PTL television ministry demonstrate vividly that the Respondent in this case is abundantly endowed with the ability to gain access to the national media.[7] There is no doubt that the Respondent can make his voice heard in the form of public debate. His proper remedy, if satire and parody do indeed call for a "remedy", is there, not in the courts.

[6] In this case the Respondent did not even need to use his access to that arena because, as the jury properly found, no reasonable reader could have understood the parody to allege facts. 797 F.2d at 1278. On the other hand, the Respondent could and did contest the suggestion of hypocrisy that is the essence of this parody. Moreover, this Court should avoid encouraging other public figures to seek redress in the courts for other parodies or satires.

[7] There is little doubt that the Respondent's highly public allegations concerning Reverend Jim Bakker likely caused Bakker substantial emotional distress. But no one would suggest that Bakker should be allowed to sue to recover for that distress absent a showing that the allegations were false.

Of course no remedy is required here because, as the jury found, no one could believe that the parody at issue was factual.

B. The Development of Tort Theories Other than Defamation Poses Grave Risks to the First Amendment.

Defamation is not the only tort theory available to a plaintiff aggrieved by another's speech. Since the famous Warren and Brandeis article, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), invasion of privacy has evolved into a commonly pleaded alternative cause of action based on the same facts as allegations of defamation.[8] The very fact that courts are still struggling to harmonize the relationship among defamation, privacy, and the first amendment suggests that this Court should not open the door to new tort theories based on allegedly damaging publications, at least for public-figure plaintiffs.[9] *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967) (first amendment applied to "false light" claim); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (first amendment applied to matters of public record). Both the extent to which courts have struggled with these issues and the opportunities for redress already available through the torts of defamation and invasion of privacy suggest that there is little need to develop other torts.

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[8] Mead, *Suing the Media for Emotional Distress: A Multimethod Analysis of Tort Law Evolution*, 23 Washburn L.J. 24 (1983), shows the extent to which this has become a common phenomenon. It was predicted some time ago that the privacy cause of action might eventually eclipse that for defamation. Wade, *Defamation and the Right of Privacy*, 15 Vanderbilt L. Rev. 1093, 1124-1125 (1962). That same commentator suggested that both causes of action eventually might be subsumed into a "larger tort of intentional infliction of emotional suffering." *Id.*

[9] In this case, the trial court dismissed a statutory privacy claim for "appropriation" because the parody was not "for purposes of trade." 797 F.2d 1273.

Plaintiffs, however, have not limited their claims to defamation and invasion of privacy. The cases in which HBO has been a defendant[10] show that plaintiffs are exceptionally inventive in developing alternative tort theories that rely on the same nexus of facts as their defamation claims. Claims of intentional and negligent infliction of emotional distress are the most obvious in this case, but other claims, such as "prima facie tort," dilution of trademark, intentional interference with business expectancy, and "incitement," are also common. *See, e.g., L.L. Bean v. Drake Publishers*, 811 F.2d 26 (trademark dilution and infringement); *Golub v. Esquire Publishing, Inc.*, 12 Med. L. Rptr. 1653 (N.Y. Sup. Ct.), *aff'd in part and mod. in part*, 124 App. Div. 2d 528), 508 N.Y.S.2d 188 (1986) (prima facie tort); *Olivia N. v. National Broadcasting Co.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 88, *cert. denied*, 458 U.S. 1108 (1982) (incitement).

Courts have frequently analyzed these related causes of action and tort theories as similar to or a part of the claim for defamation, particularly where the claim is based on a parody or satire. *See, e.g., L.L. Bean v. Drake Publishers*, 811 F.2d 26 (first amendment protection from trademark dilution claim); *Polygram Records v. Superior Court*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (dismissing defamation and related claims). *See generally* Dorsen, *Satiric Appropriation and the Laws of Libel, Trademark and Copyright: Remedies Without Wrong*, 65 B.U.L. Rev. 923 (1985). But as this case shows, the defeat of a defamation claim does not automatically result in the demise of other related claims and theories. *See, e.g., Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (*en banc*) (emotional distress claim survived where defamation claim failed); *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176 (1983) (emotional distress claim survived where slander claim failed). *See*

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[10] *See* pp. 2-3 above.

generally Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 Colum. L. Rev. 1749 (1985). These other claims impose costs both on the first amendment and on the judicial system, even if these additional causes of action ultimately are dismissed. *See Anderson v. Liberty Lobby*, 477 U.S. ——, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (summary procedures favored to avoid litigation costs and chilling effect). But more importantly, these claims seek redress for injury that could be compensated through a defamation claim if the necessary elements are proven and for which society's interest in providing compensation is minimal at best.

II. PARODY OR SATIRE OF PUBLIC FIGURES SHOULD NOT BE PUNISHED THROUGH THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The touchstone for public-figure defamation cases is that all speech, unless it is known to be false or is uttered with serious doubt as to its truthfulness, deserves first amendment protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). But the very nature of the tort theory upon which Respondent prevailed at trial requires the trier of fact to focus not on whether the offending statements were false and known to be false but on the unattractiveness of the message and its speaker. In the context of parody or satire about a public figure, such a cause of action simply cannot survive first amendment scrutiny.

A. A Sense of Outrage Is Most Likely to Be Provoked by Unpopular or Critical Speech.

The Court of Appeals emphasized that it was concerned with emotional distress provoked by outrageous behavior, "not with statements per se." *Falwell*, 797 at 1276. The Court of Appeals thus focused on the impact of the speech

and the character of the speaker, holding that the issues of truth or falsity and opinion or fact, central to a defamation action, were "irrelevant in the context of this tort." *Id.* The Court of Appeals then had merely to find evidence of the defendant's evil intent and plaintiff's distress. *Id.* at 1276-1277. The resulting threshold for liability was both surprisingly low and vague. In effect, the jury had only to conclude that "an average member of the community . . . [would] exclaim, 'Outrageous!'" *Restatement (Second) of Torts* § 46 comment d (1984).[11]

This tort theory and its supporting analysis is utterly inconsistent with the first amendment, especially when the speech at issue is caustic and abrasive satire. Parody and satire, if effective, inevitably will cause a cry of "Outrageous!" both from an offended plaintiff and from the community. For example, Jonathan Swift's *A Modest Proposal*, with its suggestion that "Persons of Quality and Fortune" buy and eat Irish babies to solve Ireland's overpopulation problem, must have provoked at least as strong a reaction as did the publication in the present case. J. Swift, *Satires and Personal Writings* 24 (1932). The intention of a satirist or parodist to shock and outrage his audience is implicit in the idea of satire. *L.L. Bean*, 811 F.2d at 28. If parody or satire cannot produce that sense of outrage, it will lose its most important function—to challenge conventional ideas through humor where a direct attack would be impossible or less forceful.

The trier of fact also will inevitably find that it was the intention of the author of a strong satire to cause the "outrage" of which the plaintiff complains. It is hard to imagine, for instance, that Gary Trudeau does not "intend" to anger the subjects of some of his Doonesbury cartoons. It is regrettable, but because juries are

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[11] The *Restatement (Second) of Torts* § 46 comment d suggests that liability should not be found for "rough language" or for an "unflattering opinion," but the decision below apparently did not take that suggestion into account.

composed of human beings, it is probable that an unpopular speaker stands a greater likelihood of being held liable under this tort theory then does a more benignly perceived speaker.[12]

Society's interest in punishing speech that is not false but that causes distress without harming a reputation is minimal at best. Particularly where the plaintiff is a public figure, hurt feelings from insults or harsh commentary are a price that all must pay for the privilege of open and unfettered political debate. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ——, 106 S. Ct. 1558, 1561, 89 L. Ed. 2d 783 (1986).

The very subjectivity of claims for emotional distress suggests as well that society has a lesser interest in compensating this kind of perceived injury than for the more objectively verifiable harm to reputation from false statements of fact. Indeed, it was the absence of objective evidence of emotional distress that slowed development of the tort where emotional distress was unaccompanied by a physical injury. W. Keeton & W. Prosser, *Law of Torts* § 12 at 54-57 (5th ed. 1984). That hesitancy in recognizing the tort in these circumstances, particularly where the countervailing interest is in critical speech about a public figure, shows that this Court need not recognize a substantial societal interest or an interest separate from the one already protected by a defamation action.

B. The Court of Appeals Decision Threatens to Return Speech to Its Former Status at Common Law.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny constitutionalized falsity as a necessary element in a defamation cause of action and made clear

[12] Speech that is indecent also is more likely to provoke anger or outrage and thus liability. But this allows such speech to be punished without the procedural and other protections that must be satisfied in order to find speech "obscene." *See Pope v. Illinois*, —— U.S. ——, 107 S.Ct. 1918, 95 L. Ed. 2d 439 (1987) (protections where publication claimed to be obscene).

that the first amendment limits recovery in defamation actions to claims by public figures based on false speech. The requirement of knowing falsity or substantial doubt, however, which now seems a truism, was a dramatic departure from earlier doctrine. Prior to *New York Times*, 376 U.S. 254 (1964), a significant minority of jurisdictions did not even make truth an absolute defense. Instead, truth was a qualified privilege that could be lost if a publication were not made with good motives and for justifiable ends. *See* R. Sack, *Libel, Slander, and Related Problems* 131 (1980). *See also NAACP v. Moody*, 350 So. 2d 1365 (Miss. 1977) (examining Mississippi statute allowing liability for truthful statements). The Court of Appeals decision disregards the requirement that speech be false before it can be actionable and returns speech to its historically vulnerable status in which a speaker could be punished if the finder of fact determined that the speaker was malicious.

The cause of action for defamation developed in part because of concerns that critical speech would lead to violence and civil unrest. *See* Sack at 130. Consequently, the truth of a critical statement was an exacerbating factor rather than a defense because it was widely believed that a true statement was even more likely to provoke a violent reaction. *Id.* Criminal and seditious libel laws were enforced with even more vigor when an accusation was true. *See Garrison v. Louisiana*, 379 U.S. 64, 67-69 (1964); Lovell, *The "Reception" of Defamation by the Common Law*, 15 Vanderbilt L. Rev. 1051, 1062 (1962) (underlying theory that "[t]here could never be 'truthful' written criticism of the gracious sovereign and his officials"). The Court of Appeals in this case, however, appears to have concluded that even *New York Times* supported its return to the common law disregard of truth or falsity: "Properly read, *New York Times* focuses on *culpability*. The emphasis of the actual malice standard is knowing . . . or reckless." *Falwell*, 797 F.2d at 1275 (emphasis added).

In the Star Chamber, where prosecutions for defamation achieved their greatest flowering in the seventeenth century, truth was irrelevant in the same way as it was to the Court of Appeals. As did the Court of Appeals, the inquisitors of the Star Chamber focused on the culpability or evil intent of the speaker.

> The Star Chamber was not concerned with the harm to the victim so much as the wickedness of the defendant; and this mainly lay in doing something of a seditious nature or likely to cause disorder. It did not matter that the victim was dead, or that what was said of him was true, or that it was published only to him.

S. Milsom, *Historical Foundations of the Common Law* 341 (1969). *See also* Lovell at 1060-62 (role of Star Chamber and relation to licensing the press). Indeed, there are striking parallels between the Star Chamber's leading case on defamation and this case. In *libellus famosus* the Star Chamber punished a defendant for an "infamous libel in verse" about the recently deceased Archbishop of Canterbury. *See* Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 565 (1903).

The focus on the speaker's behavior and intention, which the plaintiff must prove in order to prevail in a claim of intentional infliction of emotional distress, returns speech to this prior unprotected status.[13] The focus on intention also leads to confusion of common law "malice" with the "actual malice" of *New York Times*. The Court of Appeals decision effectively disregards this Court's efforts to avoid that confusion, *see, e.g., Henry v. Collins*, 380 U.S. 356, 357 (1965) (improper confusion in jury instructions between intent to harm and intent to lie); *Garrison v. Louisiana*, 379 U.S. at 70-75 (reject-

[13] *Restatement (Second) of Torts* § 46 comment d notes that "malice" may be an element along with the outrageousness of the defendant's behavior.

ing "good motives" as a consideration). By doing so, the decision below invites trial courts and juries to punish speech for its motivation, not for its falsity.

C. Alternative Tort Theories Lack the Critical Elements Required to Prove Defamation.

The missing element of falsity is of central importance in demonstrating why this Court should not sanction alternative tort theories in defamation cases. But the nature of the tort sanctioned by the Court of Appeals also allows a trier of fact to disregard other critical elements of defamation designed to protect the free flow of information. For instance, the requirement in defamation cases that a publication be "of and concerning" the plaintiff, *see generally* Sack at 112-124, is absent. *See Restatement (Second) of Torts* § 46 Illustration 1 (statement to wife about husband's condition not "of and concerning" her). This is particularly telling, as one must assume that the Respondent would have suffered even more emotional distress had a publication parodied his personal concept of God or Christ. Without the "of and concerning" requirement, why would such speech not be actionable if it were sufficiently outrageous? Allowing punishment for such a parody, however, would be akin, if not identical, to punishment for blasphemy. *See* L. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 55-57 (1957).

The privileges developed in defamation cases are similarly unknown to the tort of intentional infliction of emotional distress. Thus a plaintiff might seek recovery for his distress from republished allegations from court proceedings. While the judicial record privilege in defamation law almost certainly would protect this republication, such a privilege does not presently exist in the tort of intentional infliction of emotional distress. *See also* Sack at 207-338 (other privileges); *cf. Cox Broadcasting v. Cohn*, 420 U.S. 469 (application of first amendment privacy context to protect republication of official record).

The development of the law concerning these essential elements of the defamation cause of action, along with the elements of falsity, defamatory meaning, and fault, demonstrate the extent to which courts have struggled to protect speech, both through the common law and, more recently, through constitutional principles. To hazard possible repetition of this development for an entirely new tort poses not only grave risks to free speech but also an enormous expenditure of energy and resources by courts and litigants. Where the interest of society in compensating a public figure for hurt feelings provoked by a parody or satire is minimal, that risk and those expenditures should not be incurred.

D. Public Figures Should Be Barred From Recovering Damages for Parody or Satire.

The Court of Appeals was aware that the present case raised first amendment issues when it allowed a public figure to recover for speech about which there was no finding of falsity. The court properly recognized that

> the defendants are . . . entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel.

Falwell, 797 F.2d at 1274. But the difficulties the Court of Appeals experienced in providing that "same level of protection" illustrate why this tort theory must not be available to public-figure plaintiffs as a remedy for their subjective feelings of insult provoked by satire or parody unless the publication contains a false statement of fact made knowingly or with reckless disregard for its falsity.

The central conundrum for the Court of Appeals was applying the *New York Times* standard of knowing falsehood or substantial doubt to speech which was, by

definition, not intended to express true facts and which the speaker did not intend to be perceived as the expression of the true facts. *Falwell*, 797 F.2d 1274-1275. Instead of seeking to apply the constitutionally mandated "actual malice" standard, however, the Court of Appeals rejected "actual malice" out of hand as "add[ing] a new element to this tort [of intentional infliction of emotional distress] and alter[ing] its nature." *Id.* at 1275. The "actual malice" standard indeed is difficult to apply to a satire aimed at a public figure or to the tort of intentional infliction of emotional distress. This is precisely because this tort theory can be used to punish speech based on the intentions of the speaker or the outrageousness of the speech—clearly a reason for rejecting recovery in these circumstances, not for rejecting the actual malice standard.

The Court of Appeals should have resolved this conundrum in the only way that is consistent with the first amendment. Absent showings that statements of fact were made and that the speaker believed those statements were false or had serious doubts about their truthfulness, public-figure plaintiffs should be barred from recovering damages for parody or satire. Their legitimate interest in preserving their reputations remains protected if they are able to show that the offending statements are factual, not opinion or parody.[14] Damage to feelings, too, can be an element of damages in a defamation action if a false statement is proven. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 ("mental anguish and suffering").

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[14] "Outrageous" statements made in purely private disputes not involving public figures need not be addressed at this time. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (different first amendment considerations absent public issues); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (face-to-face use of "fighting words").

Criticism by satire and parody is one of the burdens that public figures must bear for their privileged status. Public figures should be required to seek redress not in the courts but in the arena of public opinion.[15] They should not be permitted to avoid the rigors of that constitutionally preferred forum through the ingenuity of lawyers using new tort theories that serve no substantial societal interest.

CONCLUSION

For the reasons stated, amicus Home Box Office, Inc., respectfully urges that the Court reverse the opinion of the Court of Appeals and vacate the judgment entered by the trial court.

RESPECTFULLY SUBMITTED this 15th day of June, 1987.

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[15] One would not expect the Respondent to respond specifically to the absurd caricature which the jury properly found unbelievable. Nonetheless, the Respondent could and did use his access to the public to dispute the suggestion of hypocrisy implicit in the parody. *See, e.g., Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) (discussing Respondent's mailings and fund-raising success following publication of parody).

AMICUS CURIAE

BRIEF

MOTION FILED
JUN 15 1987

No. 86-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,

Petitioners,

—vs.—

REVEREND JERRY FALWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, urging reversal of the decision of the court below in favor of respondent Jerry Falwell, holding that a public figure can recover damages for intentional infliction of emotional distress arising out of the publication of a parody which no reader could reasonably believe to describe actual facts about the plaintiff. This motion is necessitated by the refusal of counsel for respondent, Jerry Falwell, to grant permission to file such a brief. AAP's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The AAP is the major national trade association for book publishers in the United States. Its more than 250 members include most of the nation's leading commercial book publishers and many smaller and non-profit publishers, including university presses and scholarly associations. All of AAP's members share a firm commitment to the free dissemination of ideas and the need to prevent erosion of First Amendment rights.

AAP's members are justifiably proud of their tradition of fulfilling their First Amendment mandate by providing the nation with the means to engage in "uninhibited, robust, and wide-open" debate on issues of public importance. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). In carrying out this duty, AAP's members also constantly live with the threat of punitive and potentially debilitating lawsuits by individuals who believe themselves victimized by the vigorous exercise of First Amendment freedoms. In recognition of the grave threat posed by such lawsuits, this Court has, over the course of more than two decades, carefully developed constitutional limitations on the right of individuals to recover damages arising out of allegedly tortious publications. Most especially, the Court has sought to assure that, however harsh, critical or offensive, the light shed by free speech upon the activities of public officials and public figures may not be dimmed by those properly subject to its glare.

This case presents the question of whether public figures should be allowed to sidestep these fundamental constitutional protections for the press by being able to transform a failed libel action into a successful claim for intentional infliction of emotional distress. Respondent Jerry Falwell, a prominent religious and political figure, could not prevail on his libel claim because the jury found that no reasonable person could believe that petitioners' parody was describing actual facts about Falwell. Nevertheless, the Fourth Circuit upheld an award of $200,000 in damages for what essentially amounts to Falwell's claimed hurt feelings. In so ruling, the court below,

while paying lip service to the governing constitutional guideposts, in essence, ignored them, and instead altered the delicate constitutional balance struck by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny.

The impact of the Fourth Circuit's ruling upon a vigorous press, were that ruling to be upheld, may well be dramatic. For that ruling threatens severely to impair the unfettered exchange of ideas envisioned by this nation's founding fathers as a basic necessity of democratic government.

The annexed brief presents the AAP's view as to why the decision below must be reversed as plainly incorrect under governing First Amendment principles. It also addresses the untoward implications for book publishers of any other result. We therefore respectfully request that AAP's motion for leave to file the annexed brief be granted.

Respectfully submitted,

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COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Statement of the Case

This action arises out of the publication of a parody, which appeared in the November 1983 and March 1984 issues of Hustler Magazine. The subject of the parody was the Reverend Jerry Falwell, a controversial and well-known religious and political figure. In the parody, Falwell appeared as the featured celebrity in an advertisement that satirized the popular advertising campaign for Campari Liquer in which celebrities talk about their "first time." The parody contained a disclaimer

which stated: "AD PARODY—NOT TO BE TAKEN SERIOUSLY." In addition, the parody was listed in the magazine's table of contents as "FICTION; Ad and Personality Parody."

Falwell filed suit in the United States District Court for the Western District of Virginia against the magazine's publishers, petitioners Larry Flynt and Hustler Magazine, Inc., and the magazine's distributor, Flynt Distributing Co., alleging libel, invasion of privacy and intentional infliction of emotional distress. At the close of evidence, the district court dismissed the invasion of privacy claim and submitted the libel and emotional distress claims to the jury. The jury returned a verdict for the defendants on the libel claim, finding that the parody could not reasonably be understood as describing actual facts about Falwell or actual events in which Falwell participated. However, the jury found for Falwell on the intentional infliction of emotional distress claim, awarding $100,000 in compensatory damages jointly against Flynt and Hustler, and $50,000 in punitive damages against both Flynt and Hustler.[1] The court denied defendants' motion for judgment notwithstanding the verdict and entered judgment for Falwell on his intentional infliction of emotional distress claim.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision below. The court explicitly recognized that defendants were "entitled to the same level of first amendment protection in an action for intentional infliction of emotional distress that they would receive in an action for libel." Nevertheless, the court found that the *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) standard of fault was satisfied upon a showing that defendants published the parody with an intent to cause Falwell emotional distress. *Falwell* v. *Flynt*, 797 F.2d 1270 (4th Cir. 1986). By a vote of six to five, the Fourth Circuit denied a petition for rehearing in banc. The dissenters argued that the jury verdict below "surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all

1 The jury found for defendant Flynt Distributing Co. on both the libel and intentional infliction of emotional distress claims.

political debate." *Falwell* v. *Flynt*, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting).

ARGUMENT

THE SAME FIRST AMENDMENT CONSIDERATIONS THAT PRECLUDE A PUBLIC FIGURE FROM RECOVERING ON HIS LIBEL CLAIM ALSO BAR HIS RECOVERY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

A. The Parody of a Public Figure Regarding an Issue of Public Concern Falls Within the Core Protection of the First Amendment

The First Amendment's license to criticize public officials and public figures on issues of public concern is a fundamental principle of American government. *See Roth* v. *United States*, 354 U.S. 476, 484 (1957); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931). As Judge Learned Hand explained, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

Central to the realization of this conception has been the Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The Court there held that public officials could not recover damages for defamation unless they proved "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The Court subsequently expanded the *New York Times* protection to defamation actions brought by all public figures. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). The Court has also extended the *New York Times* rule beyond the context of defamation actions to invasion of privacy suits involving matters of public concern. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). Application of

the *New York Times* actual malice rule as a constitutionally required standard of fault has reflected, in each instance, the need carefully to balance an individual's right to redress injury to reputation against providing the press with the "breathing space" essential for it to fulfill its First Amendment task. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 336 (1974); *Time, Inc.*, 385 U.S. at 388; *New York Times*, 376 U.S. at 271-72.

In defining the proper application of the *New York Times* standard of fault, this Court has consistently indicated that the fact that speech may be motivated by hatred, spite or an intent to injure is irrelevant for First Amendment purposes. *See Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U.S. 6, 10-11 (1970); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967); *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) ("[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred."). Especially in cases of criticism leveled against influential public opinion makers like the Reverend Falwell, such "motivations" may be unavoidable. As this Court observed in *Garrison*, 379 U.S. at 74 (quoting Noel, *Defamation of Public Officials and Candidates*, 49 Colum. L. Rev. 875, 893 n.90 (1949)): "In the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." But this fact in no way diminishes the First Amendment protection to be accorded such centrally important speech.

The principles underlying *New York Times* apply with particular force to the parody of Reverend Falwell at issue in this case—however crude, distasteful or offensive that parody would strike most readers. As Judge Wilkinson expressed in his dissent from denial of rehearing in banc: "The Reverend Falwell is at the forefront of major policy debates; he enjoys the most intimate access to the highest circles of power; he possesses a forum for presenting his views and establishing his character; he has sought and relished the give-and-take of political combat." *Falwell* v. *Flynt*, 805 F.2d 484, 485 (4th Cir. 1986) (Wilkinson, J., dissenting). In short, Reverend Falwell is a highly controversial, outspoken public figure who has

"thrust himself to the forefront" of public debates concerning political, moral and social controversies. *See Gertz*, 418 U.S. at 345. As such, he must be prepared "to thrive in a hardy climate" in which the comment and criticism he invites may well include "vehement, caustic and sometimes unpleasantly sharp attacks." *New York Times*, 376 U.S. at 270, 273.

The criticism which here formed the basis for recovery was a sexual parody. Parody and other forms of satire are fully protected, historically important forms of expression. *See Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). Virtually by definition, it is the function of parody to stir discomfort and "inflict" distress. *See Falwell* v. *Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting) ("Political satire and parody *aim* to distress. This genre of commentary depends on distortion and discomfiture for its effect.") (emphasis in original). Were the often offensive character of parody to strip it of constitutional protection, the First Amendment would be rendered meaningless.

Many would undoubtedly draw a distinction between petitioners' parody and the kind represented by Gary Trudeau's journey to the inside of Ronald Reagan's brain in *Doonesbury*. However, the First Amendment prohibits judges and juries from making such normative judgments. The majority may not impose its own standards of decency upon those who wish to express an unpopular viewpoint. *See N.A.A.C.P.* v. *Button*, 371 U.S. 415, 445 (1963) (First Amendment protection does not depend upon "the truth, popularity, or social utility of the ideas and beliefs which are offered"). *See also Spence* v. *Washington*, 418 U.S. 405, 412 (1974); *Papish* v. *Board of Curators*, 410 U.S. 667, 670 (1973); *Street* v. *New York*, 394 U.S. 576, 592 (1969). "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticisms but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States*, 322 U.S. 665, 673-74 (1944). Under our democratic form of government, even "the most repulsive speech enjoys immunity" so long as it falls within the

constitutional boundaries established by *New York Times* and its progeny. *Letter Carriers* v. *Austin*, 418 U.S. 264, 284 (1974).[2]

That the theme of the parody here punished was sexual in nature forms no basis for affording such speech a lesser degree of First Amendment protection. As this Court observed in *Roth* v. *United States*, 354 U.S. 476, 487 (1957), the topic of sex "has indisputably been a subject of absorbing interest to mankind through the ages" and remains "one of the vital problems of human interest and public concern." Recent, widely-publicized events involving Reverend Falwell and the PTL Ministry confirm that the topics of sex and religion continue to be subjects of enormous public fascination and concern. Indeed, Reverend Falwell has himself drawn the public's attention to the very interplay of sex and religion which he so vehemently objects to in the context of the Hustler parody.

B. A Public Figure Cannot Circumvent Well Established First Amendment Principles by Recasting a Failed Libel Claim as an Action for Intentional Infliction of Emotional Distress

The intentional infliction of emotional distress tort is of relatively recent origin. *See* Restatement (Second) of Torts § 46, comment b (1965) ("Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone."). The tort has traditionally had a rather limited scope of application. As Dean Prosser noted during the 1970's, recovery for such a cause of action was then "limited to the most extreme cases of violent attack, where there is some especial likelihood of fright

2 Parody is by nature hyberbolic speech. This Court has repeatedly made clear that rhetorical hyperbole is absolutely protected under the First Amendment. *See Letter Carriers* v. *Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U.S. 6, 14 (1970).

or shock, usually on the part of a woman." Prosser, *Law of Torts* (4th ed. 1971).

In recent years, there has been a growing tendency on the part of plaintiffs suing over unfavorable press treatment to plead intentional infliction of emotional distress along with libel and invasion of privacy claims. *See* Mead, *Suing the Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Wash. L.J. 24 (1983). This expanding application of the emotional distress cause of action raises serious First Amendment implications, particularly in the context of lawsuits commenced by prominent public officials and public figures seeking to stifle criticism. To the extent that such a cause of action permits public figures to circumvent the well established constitutional limitations on recovery for libel and invasion of privacy, the emotional distress tort threatens to eviscerate the significant First Amendment protection afforded defendants under the *New York Times* line of precedent.[3]

The present case vividly demonstrates the danger posed by an expansive, unchecked application of the intentional infliction of emotional distress cause of action. The jury here found that petitioners' parody could not reasonably be understood as making any actual statements of fact about Falwell or about events in which Falwell participated. In the absence of any false statement of fact, Falwell could not satisfy the *New York Times* actual malice standard. *See Letter Carriers* v. *Austin*, 418 U.S. 264, 284 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact."). The jury was nevertheless allowed to award $200,000 in damages on the emotional distress claim upon a showing that the publication was "outrageous," that the publisher intended to harm Falwell and that Falwell suffered emotional distress as a result of the publication. As demonstrated below,

3 In so arguing, *amicus* does not express a view as to the viability of the emotional distress tort where invoked as a cause of action by purely private individuals on subjects of little public concern. Arguably, the balancing of interests that would there be presented could lead to a different conclusion than is mandated in the context of public officials and public figures.

this showing fails to comport with standards mandated by this Court for subjecting publishers to tort liability.

Falwell's showing that petitioners' parody was "outrageous" to the average person does not constitute a sufficient basis under the First Amendment to permit recovery of damages. As already noted, *see* pp. 5-6 *supra*, it is a fundamental principle of our constitutional system that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U.S. 576, 592 (1969). *See Terminiello* v. *Chicago*, 337 U.S. 1, 4-5 (1949).

Proof that petitioners published their parody with an intent to harm respondent also fails to surmount the constitutional hurdle presented by *New York Times* to recovery for an allegedly tortious publication. The Fourth Circuit explicitly stated that petitioners were "entitled to the same level of first amendment protection in an action for intentional infliction of emotional distress that they would receive in an action for libel." *Falwell* v. *Flynt*, 797 F.2d 1270, 1274 (4th Cir. 1986). As the court noted, "[t]o hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which it sought to abolish." *Id*. Notwithstanding this caveat, the court proceeded to equate the intent to harm required to state a cause of action for intentional infliction of emotional distress with the level of fault mandated by *New York Times* in a libel action. *Id*. at 1275. Such a ruling is plainly incorrect under governing Supreme Court precedents. *See Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967) (instructions permitting jury to impose liability based on defendant's hatred, spite, ill will or intent to injure are "clearly impermissible" under *New York Times*).[4] *See also* p. 4 *supra*. As the Court has aptly observed, if liability were to be premised on the mere intent to cause harm rather than the actual malice standard of *New York Times*, it would become a "hazardous

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4 *Accord Letter Carriers* v. *Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6, 9-11 (1970); *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 (1966); *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74 (1964).

matter" to ever criticize a popular public figure. *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964).

Finally, to allow Falwell to recover based on a showing that he suffered "emotional distress" as a result of petitioners' publication would fundamentally alter the careful balance which has been struck by this Court between encouraging unpopular speech and protecting individual reputation and sensibilities. Here to permit recovery—where there has been no false statement of fact, no proven injury to reputation, solely hyperbolic speech about a prominent public figure and a topic of recurring public interest—would diminish the "increased risk of injury" that the First Amendment requires public figures to accept, *see Gertz*, 418 U.S. at 345, and tip the balance away from vital speech interests in favor of "the very persons whose calling requires emotional strength and resiliency." *Falwell* v. *Flynt*, 805 F.2d 484, 486 (4th Cir. 1986) (Wilkinson, J., dissenting).

In sum, Falwell's "injury," such as it is, fails to satisfy the constitutional standards necessary to support an award of damages against a publisher. In circumstances where speech dealing with public personalities is involved, how the claim is labeled should not govern whether the protections of the First Amendment are to be available. *Cf. Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (extending *New York Times* rule to actions for invasion of privacy). Damage recoveries in such cases ought not to turn on the degree to which a creative plaintiff is able to end-run the factual and legal predicates heretofore understood to govern such recoveries. Rather, the requirements of *New York Times* must be squarely met, else the public official or public figure's attack upon particular speech must fail.

In line with this recognition, numerous circuit and other courts have held that a publication that is constitutionally-protected as against a libel claim cannot be collaterally attacked by means of a claim for intentional infliction of emotional distress. *See, e.g., Lewis* v. *Time Inc.*, 710 F.2d 549, 551 (9th Cir. 1983); *Pring* v. *Penthouse International, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982); *Hutchinson* v. *Proxmire*,

579 F.2d 1027, 1036 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979); *Koch* v. *Goldway*, 607 F. Supp. 223, 226 (C.D. Cal. 1984); *Reader's Digest Association, Inc.* v. *Superior Court*, 37 Cal.3d 244, 208 Cal. Rptr. 137, 690 P.2d 610 (1984).[5] As the California Supreme Court explained in *Readers Digest*:

> The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action. . . . [Plaintiff's] cause of action for intentional infliction of emotional distress . . . fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.

690 P.2d at 624 (citations omitted).

The zone of constitutional protection defined by *New York Times* is the product of more than two decades of careful delineation by this Court. Petitioners' parody was determined by a jury to fall clearly within that protected zone. The jury's subsequent award of $200,000 in damages to Falwell in the face of this prior conclusion was constitutionally impermissible.

C. An Affirmance of the Decision Below Would Have a Detrimental Impact on the First Amendment Functions Performed by Publishers

Book publishers and others live daily with the prospect of being sued by public officials and public figures stung by their criticism. Since *New York Times*, publishers have at least been able to rest assured that, absent knowingly or recklessly false speech, they would not be forced to answer in damages when

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5 *See also Fischer* v. *Maloney*, 43 N.Y.2d 553, 557-58, 402 N.Y.S.2d 991, 993, 373 N.E.2d 1215, 1217 (1978) (questioning "whether the doctrine of liability for intentional infliction of emotional distress should be applicable where the conduct complained of falls within the ambit of other traditional tort liability").

they spoke out about public figures on issues of public concern, no matter how sharp or cutting the commentary.

The Fourth Circuit's decision in this case would significantly raise the risks to publishers of pursuing such hard-hitting commentary. Under the Fourth Circuit's rationale, expression otherwise privileged under *New York Times* is actionable if it is intended to "harm" its target and in fact does cause such harm. That harm, under the appeals court's standard, need not be reputational. If the speech is sufficiently "outrageous," and the public figure plaintiff is caused "emotional upset" by it, a recovery ensues. Indeed, the reasoning of the Fourth Circuit's decision supports a recovery in such circumstances even where the expression in issue involves no false statement of fact about the plaintiff.

This rewriting of the governing constitutional standards raises the specter of the very self-censorship that *New York Times* aimed to avoid. Lawsuits such as the present one arise out of particularly provocative publications by those bold enough to subject a public figure to the critical light of public opinion. If the protections of *New York Times* can be swept aside by simply recasting what should be tested as a libel claim into an action for intentional infliction of emotional distress, publishers will "tend to make only statements which steer far wider of the unlawful zone." *New York Times*, 376 U.S. at 279. The likely effect will be that many publishers will draw back in their willingness to probe, challenge, and satirize in favor of safe editorial policies and bland editorial content.

The public benefits immeasurably from access to the widest possible range of viewpoints. The Fourth Circuit's decision poses the very real threat of constricting that flow of ideas. This adverse effect on speech may be avoided, and our commitment to unbridled public debate reaffirmed, by this Court's reversal of the decision of the Fourth Circuit.

Conclusion

For the foregoing reasons, *amicus* respectfully urges that this Court reverse the decision below as inconsistent with the constitutional standards for recovery against speech defined by *New York Times* v. *Sullivan*.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 86-1278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF FOR THE ASSOCIATION OF AMERICAN EDITORIAL CARTOONISTS, THE AUTHORS LEAGUE OF AMERICA, INC. AND MARK RUSSELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Association of American Editorial Cartoonists ("AAEC"), The Authors League of America, Inc. and Mark Russell move this Court for leave to file a brief *amici curiae* in support of petitioners in this case.[1]

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[1] Petitioners have consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondent withheld consent.

With the Clerk's permission, reflected in a letter on file with the Clerk, the brief is initially being filed in typewritten form because it contains record references and the parties are proceeding by the deferred appendix method under Rule 30.4. The printed brief will be timely filed in accordance with Rule 30.4(b).

INTEREST OF THE *AMICI CURIAE*

Amici are a professional association of editorial cartoonists, a professional association of authors, dramatists and journalists, and a political satirist.

AAEC is a non-profit organization of over 300 professional editorial cartoonists in the United States, Canada and Mexico. Founded in 1957 by John Stampone, editorial cartoonist for the *Army Times*, AAEC's purpose is "to promote and stimulate public interest in the editorial cartooning profession," defend the rights of cartoonists, sponsor exhibitions and help aspiring cartoonists.

The Authors League of America, Inc. is a national society of more than 14,500 professional authors, dramatists and journalists. Founded in 1912, the League is dedicated to safeguarding freedom of expression and encouraging a better understanding of the writing profession in America. The League has participated in numerous judicial and legislative proceedings where the rights of its members have been engaged, including cases deciding such issues as the First Amendment rights of students, censorship, obscenity and privacy rights.

Mark Russell is a political satirist who sings topical parodies while accompanying himself on the piano. For twenty years he performed at Washington, D.C.'s Shoreham Hotel. He has also written a syndicated column of political humor and published a book entitled *Presenting Mark Russell* (Everest House: 1980). He appears regularly on the "Mark Russell Comedy Special" on the Public Broadcasting Service network and gives live performances throughout the country at college campuses and conventions.

ISSUES TO BE COVERED IN THE BRIEF *AMICI CURIAE*

As is more fully developed in the brief, this case presents the question of the constitutional limitations upon the power to award damages for the tort of intentional

infliction of emotional distress caused by a publication concerning a public official or public figure. *Amici*'s livelihoods depend upon the purveyance of satire, whether it be in the form of cartoons, writings, theatre or other media. Satirical works by their very nature frequently cause emotional distress and would thus be threatened from making a meaningful contribution to political debate if the Court of Appeals is upheld.

The decision below was fundamentally flawed in that it deemed irrelevant the central First Amendment inquiry into whether the parody at issue expressed an opinion about a public figure, and, secondly, failed to hold respondent to a standard of fault equivalent to the "actual malice" test under the defamation tort enunciated in *New York Times* v. *Sullivan*. In addition, *amici*'s brief discusses the extent to which the vagueness of the emotional distress tort, as defined by Virginia law, would permit arbitrary and discriminatory enforcement on the basis of the juror's subjective views of decency and morality.

A substantial portion of the brief is devoted to a discussion of the nature of satire and political cartoons, documenting the observation of Judge Wilkinson, dissenting, below: "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress." (805 F.2d 484, 487, Appendix to Petition for Writ of Certiorari B9.) The brief sets forth the views of critics concerning these genres and pertinent examples of political satire. An Appendix contains a portfolio of American political cartoons from the nineteenth century down to the present.

CONCLUSION

For the above-stated reasons this motion for leave to file a brief *amici curiae* should be granted.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE OF RICHMOND NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VA., THE NEW YORK TIMES COMPANY, THE TIMES MIRROR COMPANY, VIRGINIA PRESS ASSOCIATION, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AND THE MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the Amici described more fully in Appendix A move the Court for leave to file the accompanying Brief Amicus Curiae In Support of Petitioners. The Amici Curiae submitting this brief are publishers of daily newspapers and magazines, and various trade associations that represent newspapers and magazines in Virginia and throughout the United States.

Amici have a substantial interest in the outcome of this case, which will determine whether a public figure can circumvent the first amendment restrictions

placed on actions for defamation by simply labeling his claim as one seeking recovery for intentional infliction of emotional distress. The decision of the Court of Appeals, if allowed to stand, directly threatens Amici's ability to express freely their views in editorials, in editorial cartoons, and in other commentary on subjects of public concern, and to report harsh or provocative views expressed by others.

Petitioners are not in a position to represent Amici. The publication out of which this case arises was, in the eyes of many, indecent and outrageous. Amici are supporting Hustler only because of the principle at stake in the case. The decision of the Court of Appeals allows punishment not only of Hustler's opinions, but also of any unpopular or unfair opinions that are intended to cause someone emotional distress and have that effect. As such, the precedent set by the lower court's decision threatens the ability of all publishers to present a diversity of views to the public.

Petitioners are willing to consent to the filing of this brief, but respondent has declined to consent. Amici therefore move this Court for leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF AMICI

The interest of Amici is set forth in the Motion For Leave To File that is bound with this brief. A description of Amici is set forth in Appendix A.

SUMMARY OF ARGUMENT

The decision below threatens the destruction of the first amendment protections for speech that through the years have been carefully crafted by this Court.

This Court, in holdings that encompass the entire landscape of first amendment concerns, has consistently refused to permit the abridgement of speech merely because it is emotionally disturbing or offensive to a recipient's sensibilities. Those holdings will be sabotaged if plaintiffs, by resorting to new tort theories, succeed in circumventing the well developed requirements of libel and invasion of privacy and are thus permitted to punish speech solely on the basis of its capacity to generate emotional distress. The crippling effect on robust and outspoken comment and criticism will be devastating.

In light of the jury's finding that no reasonable person could interpret Hustler's ad parody seriously as a literal misstatement of fact, the lower court's ruling effectively revives the common-law notion of punishing outrageous opinions. Opinions often are distress-inducing, calculated to provoke and disturb, and frequently are couched in emotionally incendiary language. But opinions do not forfeit their first amendment protection merely because they are harsh, indecent, or indecorous.

The ad parody in this case caused no harm to Reverend Falwell other than his emotional distress. Standing alone, the power of speech to generate emotional distress is not enough to justify its abridgement. Speech may be punished only when it produces some other more palpable species of social harm which government may seek to prevent. Whatever interests

the state may have in sheltering individuals from severe emotional distress, those interests are insufficient to justify the drastic interference with free speech values caused by the ruling below.

The Court of Appeals mistakenly assumed that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. This effectively equated common-law malice with constitutional actual malice, despite the axiom that proof of publication with common-law malice is not enough to satisfy the *New York Times* actual malice standard. The lower court also ignored this Court's admonition that public figures must recognize infliction of emotional distress from cultural and political adversaries as part of the risk they assume when entering the public arena, and must resort to the corrective power of counterspeech to soothe their feelings rather than seek damages through the legal process.

Punishment of speech because it is intended to cause emotional distress threatens the country's long tradition of robust political and social comment. Editorial opinions, political cartoons, and other forms of outspoken or satiric expression are often effective precisely because they are shocking to mainstream cultural sensibilities. The editorialist's very purpose may be to be outrageous. It is an unavoidable consequence of the emotive power of such speech that it frequently carries more power to inflict pain than other genres of expression. The satiric attack in this case was admittedly outside conventional mores. But if the attack is not otherwise punishable—if it is not legally obscene, if it contains no defamatory lies, if it does not pose a clear and present danger of viol-

ence—then it may not be sanctioned merely because it is emotionally distressing to its target.

ARGUMENT

I. THE CAPACITY OF SPEECH TO CAUSE EMOTIONAL DISTRESS BECAUSE IT IS OUTRAGEOUS, IMMORAL, OR INDECENT IS NOT SUFFICIENT TO JUSTIFY ITS ABRIDGEMENT

A. Speech Designed to Provoke Emotional Distress in Public Officials or Public Figures is Not Actionable, Even if Vulgar or Insulting, Unless it Poses an Imminent Threat of More Palpable Social Harm

In *Gitlow v. New York*, 268 U.S. 652 (1925), Justice Holmes said that "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." *Id.* at 673 (Holmes, J., dissenting). The same is true of the discourse in this case. Hustler's ad parody caused no harm other than the infliction of emotional distress on Falwell, an admitted public figure. To allow recovery for that distress—in the absence of any other demonstrable harm—would effectively destroy the first amendment doctrine that this Court has so carefully crafted in a broad universe of decisions involving defamation, privacy, and many other subjects.

The power of speech on issues of public concern to generate severe emotional distress is *never* enough, standing alone, to justify abridgement of that speech, even when the infliction of emotional distress is intentional.[1] Speech may be punished only when it pro-

[1] A different constitutional balance may be struck with speech involving no issue of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Connick v. Myers*, 461 U.S. 138 (1983). *See generally* Restatement (Second) of Torts §46, Comments d, e, f (1965) (providing illustrations of purely private speech that may give rise to claims for intentional infliction of emotional distress). That question need not be addressed in this case, since Falwell is an admitted public figure.

duces some other more palpable species of harm which the government may seek to prevent. As the Court explained in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

The First Amendment allows some room for defamation and false-light invasion of privacy claims, because the causes of action concern more than the protection of reputation and emotional tranquility; they serve the state's interest in deterring the publication of damaging false information. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984). Because there is "no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), a state may provide remedies for the

emotional injuries arising from such false statements. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Where falsity is absent, however, a different result obtains. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the father of a deceased rape victim was denied recovery for the emotional injuries allegedly caused by the publication of his daughter's name in violation of a Georgia statute prohibiting such disclosure. In addition to holding that the father's action was barred, the Court recognized that, at least where public figures or public officials are concerned, falsity is a constitutionally required predicate to recovery for injury to one's reputation or psyche.[2] See 420 U.S. at 490.

As with false words, the First Amendment permits punishment of speech that infringes a protected common-law property right in one's name or likeness, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), or that interferes with protected copyright interests, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), or that interferes with the orderly administration of the selective service system, *United States v. O'Brien*, 391 U.S. 367 (1968). The critical point is that in each of these situations speech is being regulated not because

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[2] The Court's decision left open the question whether falsity is always required in cases involving private persons. In a concurring opinion, Justice Powell stated his view that *Gertz* had decided the question left open by the majority in favor of such a falsity requirement. At least with respect to publications involving an issue of public concern, Justice Powell's view was recently confirmed by the Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. ___, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), which held that the First Amendment requires a private figure defamation plaintiff to prove falsity.

of its intellectual or emotional impact, but because it interferes with a legitimate social interest unrelated to content.[3]

So, too, states may legitimately ban obscene publications, after meeting the rigorous definitional requirements of obscenity, because obscene material has been declared by this Court to be utterly devoid of first amendment value. *See Miller v. California*, 413 U.S. 15 (1973). In the special first amendment context of broadcast regulation, with the unique social interests at stake in the regulation of the broadcast spectrum, the government also possesses a narrow power to regulate vulgar speech that does not rise to the level of the legally obscene. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Never has this Court permitted speech to be punished because of its emotional impact alone. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others . . . ."). No one can deny, for example, the intense emotional distress that may be generated by the spectacle of members of the American Nazi Party marching in uniformed lock-step through a Jewish community, or by hooded members of the Ku Klux Klan burning crosses and shouting vicious slurs against Blacks, Jews, and Catholics. Yet it is now axiomatic that such speech, however offensive to

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[3] It is worth noting that first amendment doctrine has been recognized to require that parody or satire be permitted broad scope when faced with claims of infringement of a copyright or the right of publicity. *See Groucho Marx Productions, Inc. v. Day and Night Co., Inc.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

mainstream values solicitous of racial and religious tolerance, is nevertheless protected unless it creates a clear and present danger of lawless action, a test that requires that the threatened violence be imminent and likely. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also Near v. Minnesota*, 283 U.S. 697 (1931).

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld a criminal conviction against a Jehovah's Witness for uttering "fighting words" to a city marshall in the course of an incident arising from a hostile crowd reaction to the appellant's proselytizing on the street. The Court stated that certain "well-defined and narrowly limited" classes of speech have never been thought to raise any Constitutional problem, including "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 571-72. In the years since *Chaplinsky* the Court has made it clear that the "fighting words" concept embraces only those sorts of face-to-face confrontations that threaten to provoke immediate violence. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1970) ("No individual *actually or likely to be present* could have regarded the words . . . as a direct personal insult.") (emphasis added); *see also Chaplinsky*, 315 U.S. at 573 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

Of significance to a proper assessment of Reverend Falwell's claim is this Court's solid rejection of the view that insults and vulgarities may be penalized merely because they offend the recipient's sensibilities. In *Cohen v. California*, 403 U.S. 15 (1970), in

which the defendant wore the words "fuck the draft" on his jacket, the Court emphasized that the state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to hostile reaction." *Id.* at 20. Rather, the Court emphasized that the state was attempting to penalize *only* the fact of communication. *Id.* at 18. This, the Court held, the state could not do.

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

Id. at 25.

Similarly, in *Street v. New York*, 394 U.S. 576, 592 (1969), a flag desecration case, the Court wrote:

> [a]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

See also Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

The ad parody in this case was neither gentle nor genteel; its shock effect was purposeful, and to most, offensive. But the parody cannot be penalized for that

offensive shock effect alone without turning back the clock on decades of entrenched first amendment doctrine.

B. Speech That is Mere Opinion or Rhetorical Hyperbole is Absolutely Protected by the First Amendment, Even if it is Outrageous, Immoral, or Indecent

The jury's specific finding that no reasonable person could interpret the Hustler ad parody as a literal misstatement of fact renders this case indistinguishable in principle from the holding in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). In *Bresler*, the Court held as a matter of law that the word "blackmail" in the particular circumstances of the case was not actionable:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that . . . their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

Id. at 14. *Bresler*, it must be remembered, was necessarily decided as a matter of federal constitutional law. The Court's ruling that the language was "rhetorical hyperbole" and not actionable was not an exercise in interpreting common-law tort doctrine, but a constitutional holding that the First Amendment

forbids tort penalties for expressions that no reasonable reader could interpret as misstatements of fact. Surely Bresler suffered emotional distress from being the object of a "vigorous epithet" in a heated community controversy. Yet it is impossible to believe that if Bresler had been clever enough to include in his lawsuit a supplementary cause of action for emotional distress, the Court would have reached a different result on his claim. *See Blatty v. New York Times Co.*, 421 Cal.3d 1033, 232 Cal. Rptr. 542, 549, 728 P.2d 1177, 1184 (1986) ("Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than "defamation" to their injurious-falsehood claims . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose.").[4]

In *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), the

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[4] The concerns expressed by the court in *Blatty* are well illustrated by an article that appeared in the Virginia Lawyers' Weekly less than two weeks after the Fourth Circuit's decision in the instant case. The headline advised: *"Plaintiff's Attorneys: Try to Include 'Intentional Infliction of Emotional Distress'."* Virginia Lawyers Weekly, Aug. 18, 1986, at 1, col. 4. The accompanying article explained: "For the second week in a row, we are reporting a case where a plaintiff has been saved because he included a count for 'Intentional Infliction of Emotional Distress'. . . . So it appears that a count for 'Intentional Infliction of Emotional Distress' should always be included in a suit wherever possible." *Id.*

Court had before it language every bit as emotionally incendiary as the Hustler ad parody. In the midst of a heated labor dispute a union newsletter printed a "list of Scabs" and included Jack London's scathing definition of a scab.[5] That definition, the Court stated, was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

The Court in *Letter Carriers* obviously believed that this "lusty and imaginative expression of contempt" was designed to inflict distress, to express disgust and loathing; even so the expression was not actionable, because it could not be reasonably understood

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[5] London's definition:

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

418 U.S. at 268.

as a literal misstatement of fact. *Letter Carriers* therefore is an important guide to the correct resolution of this case. In the rough and tumble controversies in American life, *Letter Carriers* instructs, vicious insults designed to cause severe distress will be hurled about. But unless such emotionally laden speech carries with it some harm other than its capacity to outrage it is not actionable.

There was a time when the common-law protection for "opinion" or "fair comment" in defamation actions protected only "fair" or "reasonable" opinions. The "fairness" or "reasonableness" of the comment usually was left to the relatively unguided judgment of the jury. *See, e.g.*, R. Sack, *Libel, Slander, and Related Problems*, §IV.3.6 (1980); R. Smolla, *The Law of Defamation*, §6.02 [3] (1986). This practice permitted juries to pass judgment on the "worth" of the speaker's viewpoint, and carried with it the potential for persecution of unpopular views. *See* Hill, 76 Colum. L. Rev. 1205, 1233 (1984).

When this Court stated in *Gertz*, 418 U.S. at 339, that "[u]nder the First Amendment there is no such thing as a false idea," it emancipated the outrageous or unpopular opinion from legal censure. "However pernicious an opinion may seem," the Court wrote, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40.

A harsh or outrageous opinion directed against a public figure will virtually by definition be intentionally or recklessly designed to generate severe emotional distress. Opinions are always "intentional"; they are designed to have an effect. As Justice Holmes instructed: "Every idea is an incitement." *Gitlow v.*

New York, 268 U.S. 652, 673 (1975) (Holmes, J., dissenting).

The use of the Virginia cause of action for emotional distress to punish Flynt for speech that the jury found not to be understood as fact is nothing more than the resuscitation of a cause of action for outrageous opinion. The requirement of Virginia's emotional distress tort that the conduct offend "generally accepted standards of decency or morality,"[6] requires that the judge and jury do what *Gertz* forbids: determine if the publisher's opinion is, in their minds, indecent or immoral. *Cf. Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (striking down a statute that restricted movies on basis of sacrilegious content).

II. THE COURT OF APPEALS MISINTERPRETED THE CENTRAL PRINCIPLES UNDERLYING *NEW YORK TIMES CO. V. SULLIVAN* AND SUCCEEDING CASES.

A. The Court of Appeals Improperly Equated A Publisher's Intent To Cause Emotional Distress With Actual Malice

The Court of Appeals reasoned that because the cause of action for intentional infliction of emotional distress under Virginia law contains a requirement of intentional or reckless misconduct, it already has "built in" a level of fault equivalent to that required in the defamation context by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See Falwell v. Flynt*, 797 F.2d 1270, 1274-76 (4th Cir. 1986). The analysis of the Court of Appeals is superficially seductive. The

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[6] *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

imposition of the actual malice standard in public figure defamation cases, the court argued, does not change the essence of the defamation tort; it merely raises the minimum threshold of fault. *Id.* at 1275. So too, the court reasoned, the First Amendment should not be employed to alter the essential elements of the emotional distress tort, but rather should merely require a minimum threshold of fault equivalent to that which would be required in the defamation context. *Id.* Since the record supported the conclusion that the publisher, Flynt, acted intentionally or recklessly to inflict emotional distress in publishing the ad parody, *id.* at 1276-77, Reverend Falwell had, according to the court, proved fault sufficient to satisfy first amendment requirements. *Id. Contra, Blatty v. New York Times Co.*, 42 Cal.3d 1033, 232 Cal. Rptr. 542, 551, 728 P.2d 1177, 1186 (1986) ("Indeed, in . . . [*New York Times Co. v. Sullivan*] the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell court misses this crucial point and as a result cannot be followed.").

The fallacy of the lower court's logic is its assumption that intent to cause emotional distress is the constitutional equivalent of intent to make a defamatory misstatement of fact. In effect, the lower court has equated common-law concepts of malice, i.e. ill will, spite, or a desire to injure, with constitutional actual malice, i.e. knowing or reckless falsity. Yet it is self-evident that these different kinds of intent are not the same; proof that speech is published with common-law malice is not enough to satisfy the *New York Times* actual malice standard. *See, e.g., Dun &*

Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 754 (1985); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 n.3 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964). The term actual malice as used in *New York Times* is nonsensical when applied mechanically to the emotional distress claim in this lawsuit.

B. The Decision of the Court of Appeals is Contrary to the Assumption of Risk and Counterspeech Rationales of Gertz v. Robert Welch, Inc.

Two central rationales supporting this Court's current defamation rules apply well to emotional distress suits predicated upon attacks on public figures. The first is assumption of risk. In *Gertz* the Court held that one who enters the public arena must accept an increased exposure to defamation as part of the price of fame and influence, 418 U.S. at 345, largely reflecting the common sense dictum that if you can't stand the heat, get out of the kitchen. If this first amendment principle requires that public figures assume some enhanced risks of being lied about, then surely it applies with even more force to the increased risk of being subjected to emotionally distressing verbal attacks.

In a pluralistic society diverse enough to count both Jerry Falwell and Larry Flynt in its constellation of public figures, it is inevitable that prominent individuals will occasionally be subjected to unwanted and severe emotional distress. To be attacked with intensity is never pleasant, but it is a risk that the first amendment requires Reverend Falwell to assume as part of the price of his political and religious ministry. As Professor Magruder noted long ago, "Against a large part of the frictions and irritations and clashing

of temperament incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be . . . ; upon the contrary, it would be unfortunate if the law closed all safety valves through which irascible tempers might legally blow off steam." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035, 1053 (1936). Professor Magruder was writing about the sound management of the tort system, but fifty years later his words have taken on a constitutional dimension. *Gertz* teaches that there is an assumption of risk component to the First Amendment. This assumption of risk is an essential element of a pluralistic, robust, and open culture. *See* R. Smolla, *Suing the Press* 257 (1986). In the words of Judge Cardozo, "The timorous may stay at home." *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929).

The second rationale articulated in *Gertz* is the counterspeech principle. Public officials and public figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed; their very prominence insures some degree of access to the media, permitting them to correct the lie with counterspeech. 418 U.S. at 344. If access to the media as a means of self-help justifies substantial first amendment protection for defamatory speech, it is all the more a justification for constitutional protection of speech that has merely inflicted emotional injury. No matter what the technical name given to the cause of action, the common law has always been extraordinarily wary of permitting recovery for name-calling, insults, epithets, and verbal abuse, not merely because of the assumption of risk principle, but on

the secondary rationale that such language reflects as negatively on the speaker as on the victim. *See Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966). The modern first amendment counterpart to this wisdom is that a public figure subjected to an outrageous attack may be very well able to turn the tables on his attacker by using his own access to the media to display his outrage.

This case vividly illustrates the power of such counterspeech. Exercising his own first amendment prerogatives, Reverend Falwell launched an impressive counter-attack against Flynt and Hustler. Falwell's Moral Majority, Inc., sent out two mailings over his signature. One was a mailing to 500,000 "rank-and-file" members, which described the Hustler parody and asked for contributions to help Falwell "defend his mother's memory." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986). A second mailing of 26,900 to "major donors" enclosed a copy of the parody itself, with eight of the most offensive words blacked out. *Id.* A third mailing signed by Falwell, under the auspices of the Old Time Gospel Hour, was sent to 750,000 persons. *Id.* Falwell also used his television program to discuss the parody and counterattack Flynt, displaying the ad on nationwide television. *Id.* Within thirty days of the mailings, the Moral Majority received $45,000, and the Old Time Gospel Hour received $672,000. *Id.* Falwell used his access to the media to attack Flynt with specific reference to the parody, as well as for a more generalized attack on pornography. These attacks did not mince words. Falwell wrote, for example:

> Now pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy plague. . . . And there, in my opinion, is clear proof that the billion dollar sex industry, of which Larry Flynt is a self-declared leader, is preying on innocent, impressionable children to feed the lusts of depraved adults. For those porno peddlers, it appears that lust and greed have replaced decency and morality.

Id. at 1154 n.7.

This counterattack by Falwell is precisely the sort of self-help remedy that the Court contemplated in *Gertz*. Falwell used the media to "counter the distress" by bluntly and colorfully attacking Flynt. That attack was financially lucrative for Falwell, and it served as a useful device for using his own speech to further his ideological positions. This is exactly the sort of response that the First Amendment is intended to encourage. The salvos between Flynt and Falwell give true meaning to the ideal of wide-open and robust debate. Nothing could be more antithetical to first amendment values than to give to either side the option of invoking the heavy machinery of the state tort system to exact compensation and punitive damages for the hurt feelings that may inevitably accompany these rough exchanges.

III. PUNISHMENT OF SPEECH BECAUSE IT IS INTENDED TO CAUSE EMOTIONAL DISTRESS THREATENS THE COUNTRY'S LONG TRADITION OF PARODY, SATIRE, AND EDITORIAL COMMENT

It is easy to be repulsed and offended by the speech under attack in this case. The words published by Hustler have been described by Judge Wilkinson as a "base parody" that is "unworthy" of the grand

American tradition of public satire. *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing *en banc*). One "base parody", however, does not justify the creation of a formidable legal theory of liability so broad and undefined that it threatens satiric and editorial commentary of all kinds.[7]

The use of satire, criticism, and comment in public debate has a long and established tradition in this country. *See Falwell v. Flynt*, 805 F.2d at 487 (Wilkinson, J., dissenting from denial of rehearing *en banc*). From Phillip Freneau's *National Gazette*, through H. L. Mencken, Sinclair Lewis, and the muckrakers of the early twentieth century, to the modern day editorial page writer or cartoonist, satirists and editors have criticized, excoriated, and vilified public figures since the ratification of our Constitution two hundred years ago. Sometimes their criticisms have been justified, sometimes not. But through it all, this Court

[7] The threat is by no means limited to commentary, but may also extend to more traditional forms of reporting. In the political arena, for example, it is common for the press to report on competing candidates who make vituperous comments about their opponents. Historically, the courts have been loathe to permit such political controversies to serve as the basis for defamation actions on the theory that: "Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to [policticians]. . . . Whatever is added to the field of libel is taken from the field of free debate." *Sweeny v. Patteson*, 128 F.2d 457, 458 (D.C. Cir. 1942). *See generally* R. Sack, *Libel Slander and Related Problems* 160-61 (1980). If a politician is no longer required to prove publication of a known or reckless defamatory falsehood, and instead may recover simply on a showing of intent to cause him emotional distress, the values protected by *New York Times* and its progeny will be severly undermined.

and those who shape our legal doctrine have recognized that we must take the bad with the good if we are to maintain the vigorous exchange of viewpoints so fundamental to our democracy.[8]

Judge Wilkinson pointed out in his dissent from the denial of a rehearing *en banc*:

> Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air. While Hustler's base parody is unworthy of this or any tradition, the precedent created by the cause of action against this defendant may one day come to stifle the finer forms of this genre.

Falwell v. Flynt, 805 F.2d at 487.

Satire is sometimes effective because it is shocking to mainstream cultural sensibilities. The writer's very purpose may be to outrage—to incite anger, revulsion,

[8] As James Madison explained:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding proper fruits."

Quoted in Stephens v. Thieriot, 13 Med.L.Rep. (BNA) 2143, 2147-48 (Cal. Ct. App. 1987); *see also* F. Mott *Jefferson and the Press* 38-43 (La. State U. Press 1943).

and controversy. *See* Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B. U. L. Rev. 923, 924-26 (1985). The "bite" of satire is precisely what supplies its potency. *Id.* at 924. Thomas Nast, perhaps America's premier political cartoonist, explained: "I try to hit the enemy between the eyes and knock him down." S. Hess & M. Kaplan, *The Ungentlemenly Art: A History of American Political Cartoons* 93 (Revised Ed. 1975).[9]

One unavoidable consequence of the emotive power of satire is that it often may carry more potential to inflict pain than other genres of speech. However, it has never been part of our first amendment jurisprudence to penalize speech simply because it is effective.

Nor should our first amendment doctrine attempt to chill the exercise of free expression by the unorthodox or unpopular speaker. Yet the controlling operative standard for the emotional distress tort does precisely that; use of the amorphous and fluid phrase "generally accepted standards of decency and morality" invites a jury to impose liability because of its distaste for the publisher or his views, rather than for any concrete harm caused by what is published. Consider, for example, an editorial cartoon depicting President Reagan in an S.S. uniform goosestepping his way through Germany's Bitburg Cemetary, or Gary Trudeau's recent lampoon in Doonesbury of Reverend Pat Robertson obtaining divine guidance in charting his presidential cam-

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[9] Nast's cartoons, published in Harper's Weekly, are generally credited with exposing and precipitating the downfall of William Marcy "Boss" Tweed and his notorious Tammany Hall ring. *See* S. Hess & M. Kaplan, *The Ungentlemenly Art: A History of American Political Cartoons* 93-96 (Revised Ed. 1975).

paign. Do these cartoons offend generally accepted standards of decency or morality? Amicus Richmond Newspapers, Inc. refused to run the Doonesbury cartoons on Reverend Robertson, because of a belief that they would be "extremely offensive to thousands of . . . readers." Richmond Times-Dispatch, Sept. 17, 1986, at B-1. Many others, including amicus Free Lance-Star, published Trudeau's work, *id.*, but would they have done so had they faced the possibility of an enormous money judgment because the cartoons upset Reverend Robertson?

The famous statement in *New York Times Co. v. Sullivan* espousing a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open" was not a mere slogan. 376 U.S. at 270. The words "uninhibited" and "wide-open" gather their force when they are extended to protect speech at the fringes, speech that is indecorous and irreverent. No First Amendment would be necessary if all American speech were polite, genteel, and restrained. But as the Court in *New York Times* emphasized, our national character is more robust; our marketplace of speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*

The satiric attack on Reverend Falwell was couched in a form admittedly outside conventional mores. That, however, cannot be enough to diminish its first amendment protection. For if the attack is not otherwise punishable—if it is not legally obscene, if it does not contain defamatory lies, if it does not pose a clear and present danger of violence—then it may not be proscribed and punished merely because it is unconventional, unorthodox, or distressing. As this Court put it in *West Virginia State Board of Education v. Barnette*, 319 U.S.

624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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APPENDIX

Appendix A

Description of Amici

Richmond Newspapers, Inc. is a Virginia corporation that publishes a morning newspaper, the *Richmond Times-Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation of 230,878), which are distributed in twenty-one cities and seventy-two counties throughout the Commonwealth of Virginia.

The Free Lance-Star Publishing Co. of Fredericksburg, Va. is a Virginia corporation that publishes an afternoon newspaper, The Free Lance-Star (circulation approximately 35,000), six days each week in Fredericksburg, Virginia and surrounding counties.

The New York Times Company publishes The New York Times, a newspaper with a circulation exceeding one million daily and 1.6 million on Sunday. The Company also publishes 32 smaller city newspapers in ten states (with a combined circulation of approximately 800,000) and a number of nationally distributed magazines, and owns five television stations.

The Times Mirror Company publishes the Los Angeles Times, a newspaper with a circulation of more than 1,127,000 daily and more than 1.4 million on Sunday. Times Mirror publishes eight other newspapers, including Newsday, the Baltimore Sun and Evening Sun, and The Hartford Courant, with a combined Sunday circulation of more than two million copies. The Company also operates book and magazine publishing firms, four television stations, and provides cable television service in 14 states.

Virginia Press Association is a non-profit corporation registered in the Commonwealth of Virginia. The Association represents the majority of daily (33) and weekly (89) newspapers published in the Commonwealth. These

newspapers have a daily circulation of 2,422,055; a Sunday circulation of 947,411; and a weekly circulation of 636,072.

The American Newspaper Publishers Association is a national organization representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately 90 percent of the total daily and Sunday newspaper circulation and a substantial portion of the weekly newspaper circulation in the United States.

The Magazine Publishers Association is a national trade association including in its membership 207 magazine publishers who publish 813 magazines sold at newsstands and by subscription. The Association's members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations, and pastimes of the American people.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.

No. 86-1278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HUSTLER MAGAZINE, INC. and
LARRY C. FLYNT,
Petitioners,

v.

REVEREND JERRY FALWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE ASSOCIATION OF AMERICAN EDITORIAL CARTOONISTS, THE AUTHORS LEAGUE OF AMERICA, INC. AND MARK RUSSELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE ASSOCIATION OF AMERICAN EDITORIAL CARTOONISTS, THE AUTHORS LEAGUE OF AMERICA, INC. AND MARK RUSSELL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This is the first case to present this Court with "the question of constitutional limitations upon the power to award damages" for the tort of intentional infliction of emotional distress caused by a publication concerning a public official or public figure. "In deciding the question now," the Court is "compelled by neither precedent nor policy to give any more weight to the epithet ['intentional infliction of emotional distress'] than [it has] to other 'mere labels' of state law." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 268-69 (1964) (hereafter "*New York Times*"). Thus, even as it was held in *New York Times* that "libel can claim no talismanic immunity from constitutional limitations," a judgment for the state-law tort of intentional infliction of emotional distress must likewise "be measured by standards that satisfy the First Amendment." *Id.* at 269. The court below agreed in principle that defendants are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel," (Pet. A8),[1] but it failed in practice to accord such protection.

The Court of Appeals' analysis was fundamentally flawed in that it focused on the state-law elements of the intentional infliction of emotional distress tort, to the

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[1] "Pet." will refer to the Petition for a Writ of Certiorari and the Appendices thereto. "Br. Opp." will refer to Respondent's Brief in Opposition. "J.A." will refer to the Joint Appendix to the briefs in this Court.

exclusion of the policies of the First Amendment, and the protections necessary to safeguard those policies. This error had two specific manifestations: The Court held that in suits based on this tort, the *New York Times* standard is not applicable, and that the distinction between "fact and opinion" is "irrelevant." (Pet. A 8-A 11.)

We show in subpart A that the Court of Appeals' refusal to distinguish fact and opinion in deciding suits under this tort resulted in the imposition of sanctions for publishing opinion, and therefore violates the First Amendment. This Court's decisions, in suits for defamation and in other legal contexts, have recognized that the First Amendment provides absolute protection to expressions of opinion: "Under the First Amendment, there is no such thing as a false idea." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). See also, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (dissenting opinion); *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940). This protection, as held in *Gertz* and *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U.S. 6 (1970), embraces "rhetorical hyperbole." When viewed in context, as it must be, the defendants' publication herein was just that; no reader could reasonably believe that *Hustler* was literally accusing respondent of having had sexual intercourse with his mother any more than readers could have believed that Charles Bresler had committed a criminal offense. See *id.* at 14. As Judge Wilkinson explained in dissent below, the parody was directed at ridiculing respondent for seeking to impose his views of morality on society. (Pet. B 10.) While the parody may be "unworthy" of this country's tradition of satiric commentary in political debate, *id.*, felicity of expression may not be constitutionally regulated. *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Cohen* v. *California*, 403 U.S. 15, 25 (1971).

In subpart B, we show that the Court of Appeals erred in holding that the first element of the emotional distress tort under Virginia law—that the "defendant's misconduct be intentional or reckless"—is the constitutional equivalent with respect to this tort of the *New*

York Times "actual malice" standard in defamation cases (Pet. A 11). On the contrary, by focusing on the defendant's intent to inflict an injury, the court's test parallels the "intent to defame" standard of the Sedition Act of 1798 and the common law "malice" test disapproved implicitly in *New York Times* and explicitly from *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) through *Letter Carriers*, 418 U.S. at 281-82. As *Garrison* teaches, the circumstance that a publication was made with ill will or the intent to injure is irrelevant to its contribution to First Amendment values. 379 U.S. at 73-74. By contrast, the *New York Times* standard separates constitutionally protected from unprotected expressions: "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech . . . the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75.

Additionally, the "actual malice" standard creates "breathing space" for constitutionally-protected speech lest critics of public officials or public figures "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true. . . ." *New York Times*, 376 U.S. at 279. It matters not that *under state law* liability for intentional infliction of emotional distress does not depend upon "falsity." *Falsity is an essential element of liability under the First Amendment.* "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74. Indeed, precisely because falsity is not an element of the tort, allowing public officers or public figures to recover for intentional infliction of emotional distress caused by publications concerning them intrudes impermissibly on First Amendment values. A true publication about a public person may cause him severe emotional distress, perhaps all the more because it is true. Of course, these First Amendment considerations create no impediment in the typical suit under this tort, which has a wide range of applica-

tions which either do not involve speech, or only involve speech which is addressed directly to the plaintiff and is not part of public debate.

In subpart C, we show that, under First Amendment principles, public persons should not be permitted to recover for publications concerning them under the state law tort of intentional infliction of emotional distress for another reason—the tort is "a common law concept of the most general and undefined nature." *Cantwell* v. *Connecticut*, 310 U.S. at 308. The standard is, therefore, "unlikely to be neutral with respect to the content of the speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times*, *supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 267-77 (1971). See also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963).

Virginia's version of the tort, "that the conduct was outrageous and intolerable in that it offends the generally accepted standards of decency and morality" (C.A. App. 1490), likewise fails to cabin the jurors' discretion and propensity to discriminate on the basis of their views as to what is decent and moral. Further, the standard's reference to "generally accepted standards" appears to suffer from the same constitutional defect as that of the instruction which was recently disapproved in *Pope* v. *Illinois*, 55 L.W. 4595 (U.S. May 4, 1987). See *id.* Slip Op. at 2-3.

II. Part II of the brief is an exegesis on Judge Wilkinson's observation below: "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress." (Pet. B 9.) We show that political satire, be it delivered through the medium of the editorial cartoon or literature, is uniquely vulnerable to this tort because satire's instrument is the direct, often crude and tasteless, *ad hominem* attack.

ARGUMENT

I. The Decision Below Unconstitutionally Imposes Sanctions For The Exercise Of First Amendment Rights

A. The court below rejected the defendants' contention that the parody at issue was "an opinion and therefore is protected by the first amendment," on the following ground:

> At common law the dichotomy between statements of fact and opinion was often dispositive in actions for defamation. An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se. We need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress. The defendants' argument on this point is, therefore, irrelevant in the context of this tort. [Pet. A 11.]

This ruling, which permits a defendant to be mulcted for damages because he has injured a public person[2] by publishing an opinion concerning him, cannot be reconciled with the First Amendment. The question whether such a publication constitutes "fact" or "opinion" is relevant—and may be decisive—not for some reason peculiar to the common law of defamation, but because the expression of opinion concerning public persons is protected by the First Amendment for reasons of fundamental constitutional policy.

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem,

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[2] Since public officials and public figures are subject to the same constitutional rules insofar as is pertinent to the present case, such individuals will sometimes be collectively referred to as "public persons."

we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), reaffirmed in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984). As stated in *Bose*, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 503-04. Articulation of this principle has not at all been limited to suits for defamation. The classic expression is, of course, that of Justice Holmes, "that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), Justice Roberts wrote for a unanimous Court:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. [310 U.S. at 310.][3]

[3] In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), Justice Harlan wrote an opinion (concurring in part and dissenting in part) wherein he expressed his understanding of the principles underlying *New York Times*. One of these, he wrote, was "the Court's recognition that in many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship. *Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.* See *Cantwell* v. *Connecticut*, 310 U.S. 296, 310." 385 U.S. at 406, emphasis added.

The constitutional protection of opinion extends also to "rhetorical hyperbole." *Greenbelt Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Letter Carriers* v. *Austin*, 418 U.S. 264, 286 (1974).[4] In *Letter Carriers*, which was decided together with *Gertz*, the Court struck down three state libel judgments which were based on statements printed in a union newsletter which, during the course of a labor dispute, had identified the plaintiffs as "Scabs" and set forth "a well-known piece of trade union literature, generally attributed to author Jack London, which purported to supply a definition." *Id.* at 268. Applying First Amendment analysis, the Court held:

> The definition's use of words like "traitor" cannot be construed as representations of fact. Such words

[4] *Letter Carriers* applied First Amendment analysis "to determine the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a basic tenet of federal labor policy." 418 U.S. at 270. The Court adhered to the framework for analysis established by *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966). *Linn* had held that the National Labor Relations Act ("NLRA") does not divest state courts of jurisdiction over suits for defamation occurring in the course of a labor dispute subject to the NLRA. But "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy . . .," *Linn* "limit[ed] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage"; the *New York Times* standards of "malice" were adopted "by analogy, rather than under constitutional compulsion." *Id.* at 64-65. The Court followed the *Linn* approach to pre-emption with respect to the intentional infliction of emotional distress tort in *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), discussed at pp. 19-20, *infra*.

were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [418 U.S. at 284, quoting *Gertz*, 418 U.S. at 339-40.][5]

Bresler and *Letter Carriers* have thereby constitutionalized the role of "context" in determining if the plaintiff seeks to punish the expression of an opinion,[6] whether through the literary vehicle of satire or through other common forms of expression such as rhetorical hyperbole or the epithet.[7] No reader could have thought that

[5] *Letter Carriers* also reaffirmed *Bresler*, where the use of the word "blackmail" in a newspaper article referring to plaintiff, a public figure, was held to be constitutionally protected because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U.S. at 14. See 418 U.S. at 284-86.

[6] See Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 829-31 (1984).

[7] When the reasoning of *Bresler* and *Letter Carriers* has been applied to the works of editorial cartoonists in suits by public persons, the courts have, with one exception, concluded that a constitutionally-protected opinion was expressed. See, *e.g.*, *Keller* v. *Miami Herald Publishing Co.*, 778 F.2d 711 (11th Cir. 1985); *Miskovsky* v. *Oklahoma Publishing Co.*, 654 P.2d 587, 594-96 (Okla.), *cert. denied*, 459 U.S. 923 (1982); *Yorty* v. *Chandler*, 13 Cal.App.3d 467, 470, 91 Cal.Rptr. 709, 710 (1970). But see *Buller* v. *Pulitzer Publishing Co.*, 684 S.W.2d 473, 478-79 (Mo. Ct. App. 1984) (cartoon depicting psychic in bizarre setting imputed lack of professional skill and integrity and was therefore defamatory *per se*).

The same analysis and result have obtained in suits challenging other forms of satire. See, *e.g.*, *Pring* v. *Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *Silberman* v. *Georges*, 91 A.D.2d 520, 521, 456 N.Y.S.2d 395, 397 (1982); *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 403 N.E.2d 376 (1980); *Polygram Records, Inc.* v. *Superior Court*, 170 Cal. App. 3d 543, 577, 216 Cal. Rptr. 252 (1985).

Hustler was literally accusing respondent of having had sexual intercourse with his mother any more than readers could have believed that Charles Bresler had committed a criminal offense. See 398 U.S. at 14. The Court of Appeals' analysis was thus fundamentally flawed by failing to undertake the vital inquiry into the context of the parody which, as Judge Wilkinson explained, was a literary convention directed at ridiculing respondent for seeking to impose his views of morality on society:

> The natural urge to bring down self-appointed moralists led Molière to satirize the French lay clergy in *Tartuffe*, and motivated Mencken to chastise novelists for failing to look beneath the surface of American evangelists. Sinclair Lewis acted on Mencken's suggestion by writing *Elmer Gantry*, a scathing satiric attack on the Protestant clergy and the public's willingness to boost demagogues to positions of influence. [Pet. B10.]

It is pertinent to add that both Tartuffe and Elmer Gantry were portrayed as lechers, doubtless because Molière and Lewis believed that this was a most forceful means of demonstrating their moral hypocrisy.[8]

Although the parody may be "unworthy" of this country's tradition of satiric commentary in political debate, *id.*, the felicity of expression may not be constitutionally regulated. *Hustler*'s parody, and non-obscene speech generally, is "as much entitled to the protection of free speech as the best of literature." *Winters* v. *New York*, 333 U.S. 507, 510 (1948). It is well to remember also that Justice Holmes referred to the two leaflets which were at issue in *Abrams* as "poor and puny anonymities," and that he expressed his belief that the creed that they avow is "the creed of ignorance and immaturity."

[8] It is also pertinent to note that attempts were made to suppress *Tartuffe* and *Elmer Gantry*. See Rosenheim, Jr., *Swift and the Satirist's Art* (Univ. of Chicago Press: 1963), at 29; Schorer, *Sinclair Lewis an American Life* (Univ. of Minn. Press: 1963), at 473.

(250 U.S. at 629.) As Justice Harlan wrote for the Court in *Cohen* v. *California*, 403 U.S. 15, 25 (1971), "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Indeed, if the courts were to draw such distinctions, they would undertake precisely the "kind of authoritative selection" which the First Amendment forbids." See *United States* v. *Associated Press*, 52 F.Supp. 362, 376 (S.D.N.Y. 1943, L. Hand, J.), quoted in *New York Times*, 376 U.S. at 270.

Respondent has asserted that the judgment below can be saved without "undermin[ing] the First Amendment" because Mr. Flynt engaged in "intentional wrongdoing" (Br. Opp. 8). This argument is fundamentally mistaken, for this Court has repeatedly rejected the proposition that a publication can lose its constitutional protection because it was published with the intent to injure. See p. 11, *infra*. Indeed, in *Letter Carriers*, *supra*, the Court held that no liability could be imposed for publishing the "rhetorical hyperbole" involved there, even though the jury had found that the defendants had done so with "actual malice" in the common-law sense. See 418 U.S. at 289, quoting the instructions in that case.

B. The Court of Appeals decided that a plaintiff, in a suit for intentional infliction of emotional distress, need not prove "actual malice" as defined in *New York Times*—"that is, with knowledge that [the publication] was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. According to that court, "the actual malice standard alters none of the elements of the tort [of defamation]; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication" (Pet. A 10). Applying that approach, the Court concluded that the *New York Times* requirement is satisfied by the first element of the emotional distress tort under Virginia law, that the "defendant's misconduct be intentional or reckless" (*id.* at A 11)—specifically, as the jury in this case was instructed, that the defendant "conducted himself in such

a manner in connection with the article in question as to intentionally inflict emotional distress upon plaintiff." (Pet. C2.)

In so reasoning, the court again misunderstood the teachings of *New York Times* and its progeny. To begin with, the court below was wrong in stating that *New York Times* did not change the elements of defamation law. Alabama had not required evidence of *any* degree of fault (other than the actual publication of the defamatory matter) to establish liability and support an award for general damages. See 376 U.S. at 262, 267 and 283. Even more tellingly, the standard which was applied in this case is *not* analogous to the *New York Times* "actual malice" standard. On the contrary, by focusing on the defendant's intent to inflict an injury, the court's test parallels the "intent to defame" standard of the Sedition Act of 1798 (see *New York Times*, 376 U.S. at 274) and the common-law malice test disapproved implicitly in *New York Times* and explicitly from *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) ("an intent merely to inflict harm, rather than an intent to inflict harm through falsehood") through *Letter Carriers*, 418 U.S. at 281-82 and cases cited *id.*[9]

These discredited formulae, like that which was approved by the court below, "focus[] on culpability" (Pet. A 11). The *New York Times* standard, on the other hand, "focuses on" First Amendment values. The difference affects the constitutional analysis in two significant respects.

First, unlike the Court of Appeals' approach, the requirement that the plaintiff establish knowing or reckless falsehood separates constitutionally protected from

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[9] So too, in the "false light" case of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the Court held that the *New York Times* standard must be satisfied and disapproved a trial court's instructions which "could have been taken by the jury to relate, not to truth or falsity, but to appellant's attitude toward appellee's privacy." *Id.* at 396 n.12.

unprotected expressions.[10] As the Court held in *Garrison*:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. [379 U.S. at 75.][11]

By contrast, the circumstance that a publication was made with ill will or the intent to injure is irrelevant to its contribution to First Amendment values. As the Court also held in *Garrison*:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule . . . permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." [379 U.S. at 73-74, citations omitted.]

[10] The same function is performed by the rule, discussed previously, which forbids the imposition of liability for the expression of opinion.

[11] See also, *e.g.*, *Time, Inc.* v. *Hill*, 385 U.S. at 390; *Gertz*, 418 U.S. at 340.

Second, the "actual malice" standard creates "breathing space" for constitutionally-protected speech lest critics of public officials or public figures "be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true . . . "; this is essential because a rule which inhibits the publication of truth "dampens the vigor and limits the variety of public debate." *New York Times*, 376 U.S. at 272, 279. This requirement cannot be excused on the Court of Appeals' theory that liability for intentional infliction of emotional distress does "not depend upon 'falsity' as an essential element" of that tort *as defined by state law* (Br. Opp. 4). *Falsity is an essential element of liability under the First Amendment.* "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison*, 379 U.S. at 74.[12] Yet, by holding that a plaintiff is not required to show "actual malice," the Court of Appeals' approach creates an impermissible hazard to constitutionally-protected true speech.

Indeed, the threat created for true speech is not merely indirect. A true publication about a public person may cause him severe emotional distress, all the more, perhaps, *because* it is true. Precisely because "falsity" is not "an essential" element of the tort of intentional infliction of emotional distress, the Court of Appeals' theory permits imposition of civil sanctions for the "discussion of public affairs." We hasten to point out that this is not an infirmity in the theory of the tort. Falsity is not an element of the intentional infliction of emotional distress tort because it is immaterial to its function—to vindicate the plaintiff's emotional well-being rather than his repu-

[12] Respondent has argued that the publication herein is not "legitimate or normal hyperbole" because the publication here "strays from the plaintiff's 'public character' and becomes an assault on his 'private life' or an 'intrusion into his private affairs.'" (Br. Opp. 8, quoting *Time, Inc.* v. *Johnston*, 448 F.2d 378, 380 (4th Cir. 1971)). This argument is wide of the mark since, as the jury found, "no reasonable man would believe that the parody was describing actual facts about Falwell" (Pet. A6).

tation.[13] In the typical suit, this creates no constitutional impediment because this tort (unlike defamation) has a wide range of applications which either do not involve speech,[14] or only involve speech which is addressed directly to the plaintiff and is not part of public debate.[15] But where suit is based on a publication which concerns a public person (or is otherwise within the ambit of the First Amendment), the Court of Appeals' approach, by focusing exclusively on the state law elements, leads to

[13] See Restatement (Second) of Torts § 46 & comment b (1965) (tort protects "interest in freedom from emotional distress standing alone"); W.P. Keeton, *Prosser and Keeton on the Law of Torts* 54-55 (5th ed. 1984); Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 Washburn L.J. 24, 26 (1983); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936) (hereafter cited as "Magruder").

[14] See, *e.g.*, *Womack* v. *Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974) (plaintiff recovered for defendant's conduct in obtaining photograph of plaintiff by false pretenses and turning it over to defense counsel in molestation case); *Johnson* v. *Woman's Hospital*, 527 S.W.2d 133 (Tenn. Ct. App. 1975) (deceased newly born infant was displayed to plaintiff in a formaldehyde jar); *Blakeley* v. *Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945) (directed verdict for defendant reversed where decedent committed suicide in plaintiff's kitchen and plaintiff discovered bloody corpse); *Alderman* v. *Ford*, 146 Kan. 698, 72 P.2d 981 (1937) (plaintiff's complaint alleging mutilation of husband's body stated cause of action).

[15] The classic example is *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, where defendant, a practical joker, told a woman that her husband had been severely injured in an accident. The debt-collection cases in which defendants are held liable for intentional infliction of emotional distress illustrate speech deemed tortious even though not published to third persons. *E.g.*, *Bundren* v. *Superior Court of California*, 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983) (hospital debt collector may have acted in outrageous manner by telephoning patient in hospital the day after her surgery and questioning her abusively). See also, *e.g.*, *Hall* v. *May Dep't Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981) (store whose security officer accused plaintiff of stealing and falsely claimed to have proof of her guilt liable for tort); *Samms* v. *Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961) (defendant liable for making repeated sexual advances to plaintiff).

the constitutionally impermissible result that true statements, or opinions, will be penalized.[16]

C. Under First Amendment principles, public persons should not be permitted to recover for publications concerning them under the state law tort of intentional infliction of emotional distress for another reason—the tort is "a common law concept of the most general and undefined nature." *Cantwell* v. *Connecticut*, 310 U.S. at 308. As Professor Givelber has observed:

> The tort of intentional infliction of emotional distress by outrageous conduct differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct. . . .
>
> The term "outrageous" is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct.[17]

In his seminal article promoting judicial acceptance, Professor (later Judge) Magruder said that the "formula" which he articulated "would not decide concrete cases; but it is as practicable to apply as the standard of reasonable care in ordinary negligence cases, and it would permit the courts to exercise a judgment upon the merits of the particular case, unembarrassed by the no-

[16] As in *Time, Inc.* v. *Hill*, 385 U.S. at 383 n.7, and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975), this case does not present "the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed." *Id.* Cf. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 275 (1971): "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."

[17] Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 51 (1982) (hereafter cited as "Givelber").

tion that the interest involved is beyond the pale of legal protection." [18] But Professor Givelber has disagreed: "The indeterminateness of outrageousness poses issues of fairness and practicability beyond those posed by the concept of negligence." [19] This objection is well taken, especially in the present context of publications concerning well-known individuals. *Monitor Patriot*, *supra*, provides an instructive analogy. The Court there identified "a major, and in this case decisive, difference between liability based on a standard of care, and liability based on a judgment of the 'relevance' of a past incident of criminal conduct to an official's or a candidate's fitness for office."

> A standard of care "can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Curtis Publishing Co.* v. *Butts*, *supra*, at 153 (opinion of Harlan, J.). A standard of "relevance," on the other hand, especially such a standard applied by a jury under the preponderance-of-the-evidence test, is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times*, *supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail. [401 U.S. at 276-77.]

A standard of "outrageousness" is even more "unlikely [than relevance] to be neutral with respect to the content of speech." It is quite unrealistic to suppose that a juror would find to be "outrageous" a publication that expresses an opinion with which he agrees; conversely, under so value-laden and subjective a standard, jurors

[18] Magruder, 49 Harv. L. Rev. at 1058-59.

[19] Givelber, 82 Colum. L. Rev. at 55.

are prone to impose liability based on publications with which they strongly disagree, or which they find offensive in tone. This Court has frequently recognized that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [20]

In *NAACP* v. *Button*, 371 U.S. 415, 432 (1963), the Court reaffirmed that "standards of permissible statutory vagueness are strict in the area of free expression." This principle, the Court made clear, applies fully in civil litigation: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433, citations omitted. See also *Grayned*, 408 U.S. at 109, and cases cited at nn. 6 and 7. As *New York Times* recognized, the fear of damage awards in a common law action "may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U.S. at 277.

The problem of vagueness is not cured by the "intent" component of the tort. In *Smith* v. *Goguen*, 415 U.S. 566 (1974), where the state law under which the defendant was convicted had been construed by the highest state court as limited to "intentional contempt" of the United States flag, the Court said: "Aside from the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute, this holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent." *Id.* at 580, footnote omitted. So here, the intent requirement does not clar-

[20] *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972), footnote omitted. See also cases cited id. at n.4.

ify what speech is "outrageous" or, under the Virginia standard, "offends decency or morality." In either case, the definition of the tort "is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* at 578, quoting *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971).

Virginia's version of the tort, according to which the jury was instructed here, "that the conduct was outrageous and intolerable in that it offends the generally accepted standards of decency and morality" (J.A. 177), does not cabin the jurors' discretion and propensity to discriminate on the basis of their views as to what is decent and moral. Indeed, in the context of this case, these instructions may invite the jury to impose liability because of the parody's crude treatment of sex, although it clearly was not subject to regulation as obscene since it was not "in some significant way, erotic." See *Cohen* v. *California*, 403 U.S. 15, 20 (1971).

Moreover, the standard's reference to "generally accepted standards" appears independently to violate the First Amendment. The defect is the same as that of the instruction which was recently disapproved in *Pope* v. *Illinois*, 55 L.W. 4595 (U.S. May 4, 1987), that the jury should determine the value of allegedly obscene materials by reference to the views of "ordinary adults in the whole State of Illinois." Slip op. at 2. This Court said: "Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won." *Id.* at 3. Just so, a work need not be required to satisfy "generally accepted standards of decency and morality" in order to receive constitutional protection. Indeed, the instruction herein is the antithesis of the constitutional standard enunciated in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971): "[S]o long as the

means are peaceful, the communication need not meet standards of acceptability." [21]

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[21] In the course of rejecting the defendants' submission that the parody here is protected as opinion, the court below said: "An action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se." (Pet. A 11.) *Cohen* v. *California* makes clear that where the "only 'conduct' [against which sanctions were imposed] is the fact of communication," a court "deal[s] with a [judgment] resting solely upon 'speech.'" 403 U.S. at 18. So here, liability was imposed solely for the "publication." (Pet. A 11.)

However, we do not foreclose the possibility that cases may arise where a distinction between speech and conduct may validly be drawn, because the manner of publication is such as to create serious distress *apart from the substance of the communication.* In such a case, the imposition of liability under the emotional distress tort may be constitutionally permissible. *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), is instructive in this regard. The Court there held, in accordance with precedents involving other torts, including *Linn, supra*, that Congress did not intend to oust state-court jurisdiction over actions for intentional infliction of emotional distress arising in a labor dispute. *Id.* at 305. But the Court made clear that "Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle." *Id.*

The constitutional imperative of protecting defendants against damage awards for intentional infliction of emotional distress based on publications which are protected by the First Amendment weighs more heavily than the need to maintain the federal-state relationship which is implicit in the national labor laws. Thus, to paraphrase *Farmer*, if recovery is to be permitted under this tort for injury caused by "conduct" even though it is related to a publication, "it is essential that the state tort be either unrelated to [the defendant's publication] or a function of the particularly abusive manner [in which the publication is utilized to cause serious emotional distress] rather than a function of the [publication itself]."

Moreover, if such an action is to be allowed, the *Farmer* opinion's cautionary admonition concerning trial of such suits should be closely adhered to. To again paraphrase that opinion: "In view of the potential for interference with [First Amendment rights] the trial court should be sensitive to the need to minimize the jury's exposure to [the publication itself] in cases of this sort. Where [the publication itself] is necessary to establish the context in

II. The Decision Below Jeopardizes Graphic And Literary Political Satire

Judge Wilkinson wrote below, "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress." (Pet. B 9.) Political satire, be it delivered through the medium of the editorial cartoon or literature, is uniquely vulnerable to this tort because satire's instrument is the direct, often crude and tasteless, *ad hominem* attack. As we document below, this time-honored literary convention, which is calculated to arouse indignation and expose political leaders and their follies, has made an important contribution to robust political debate.

A. The Editorial Cartoon

One of the most potent weapons of American political satire is the editorial cartoon. Its English and French pedigree dates back to the eighteenth and early nineteenth centuries to James Gillray, William Hogarth, and Thomas Rowlandson in England, and to Honoré Daumier and Charles Philipon in France.[22] From 1864 to 1900, editorial cartoonists flourished, employed by such publications as *Frank Leslie's Illustrated Newspaper* and *Harper's Weekly*, and by sharply satirical weekly magazines such as *Puck* and *Judge*. Their impact was so powerful that the major newspapers hired popular cartoonists to battle one another and boost circulation.[23]

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which the state claim arose, the trial court should instruct the jury that the fact of [publication and its content] (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages." Cf. 430 U.S. at 305 n.13.

[22] See generally Hill, *Mr. Gillray, The Caricaturist* (Phaidon Press: 1965); Press, *The Political Cartoon* (Assoc. Univ. Presses: 1981) (hereafter cited as "Press"), at 39-43.

[23] Hess & Kaplan, *The Ungentlemanly Art: A History of American Political Cartoons* (Macmillan: 1975) (hereafter cited as "Hess & Kaplan"), at 100.

The cartoonist's ability to harness public opinion against a particular candidate was achieved through gross exaggeration, cruel exploitation of physical traits or politically embarrassing events, attribution of grotesque animal features and blatant emotional appeals.[24] Lincoln was said to have been "deeply hurt" by an 1860 cartoon showing him with a Janus-like face, denying his presidential ambitions in 1858,[25] juxtaposed with his 1860 presidential campaign. Thomas Nast's unwavering commitment to the Grant Administration prompted President Grant to say in 1868: "Two things elected me: the sword of Sheridan and the pencil of Thomas Nast." [26] When Cleveland industrialist Mark Hanna was cruelly depicted by Homer Davenport throughout the 1896 campaign, Hanna tearfully remarked: "That hurts . . . to be held up to the gaze of the world as a murderer of women and children. . . . I tell you it hurts." [27]

Thomas Nast's relentless assault on New York City's Democratic machine and its leader, William M. "Boss" Tweed, was "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." [28] A fierce supporter of post-Civil War Republicanism, Nast's cartoons in the pages of *Harper's Weekly* depicted Tweed and his cohorts as vultures, ty-

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[24] Geipel, *The Cartoon: A short history of graphic comedy and satire* (A.S. Barnes & Co.: 1972) (hereafter cited as "Geipel"), at 21-40; Keller, *The Art and Politics of Thomas Nast* (Oxford Univ. Press: 1968) (hereafter cited as "Keller"), at 324.

[25] Hess & Kaplan, at 87. Lincoln later described Nast as the North's "best recruiting sergeant." Press, at 45.

[26] Hess & Kaplan, at 46-47. In 1868 Nast portrayed Democratic presidential candidate Horatio Seymour as Lady Macbeth, unable to rid himself of the taint of the New York draft riots of 1863. (Page 1a, *infra*.) Both Grover Cleveland and William McKinley credited their election victories to satiric cartoons of their opponents in *Puck* and *Judge*, respectively. *Id.*

[27] Hess & Kaplan, at 127.

[28] Keller, at 177. See also Murrell, "Nast, Gladiator of the Political Pencil," *The American Scholar*, Autumn, 1936, at 472.

rants, bloated opportunists and boozy degenerates. The success of the "boiling" Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." [29]

With the development of photoengraving in the late 1880's, the editorial cartoon became widely available. As a molder of public opinion the cartoon achieved special professional recognition in 1922, when the Pulitzer Prize added a category for cartooning.[30]

Throughout the Prohibition Era, the Great Depression and two world wars, cartoons of Boardman Robinson, C.D. Batchelor, Jay N. "Ding" Darling, Clifford Berryman, Daniel Fitzpatrick and Vaughn Shoemaker developed powerful symbols that bonded national sentiment on a variety of domestic and foreign policy issues. Walt Kelly's "Pogo" comic strip and David Levine's caricatures savaged Senator Joseph McCarthy.[31] (Page 4a, *infra.*) Courageous cartoonists like Bill Mauldin from the South and border states bared the viciousness of racism and bigotry in the 1950s and 1960s.[32] Jules Feiffer effectively mocked the hypocritical, self-satisfied Northern white liberal in the *Village Voice*.[33] In the last twenty-five years, political cartoons have helped shape public debate about major public issues. Presidents have, naturally, occupied their share of the spotlight; but equally sharp and wounding attacks have been directed against other public officials and public figures on the national, state and local levels. Targets of especially cruel darts at the hands of modern editorial cartoonists are reflected in the cartoons reproduced at pages 4a-11a, *infra.*

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[29] Press, at 251. One of Nast's most remarkable cartoons of the Tweed Ring is reproduced at page 3a, *infra.*

[30] Press, at 47, 195. See also Johnson, *The Lines Are Drawn: American Life Since The First World War As Reflected In The Pulitzer Prize Cartoons* (J. B. Lippincott: 1958).

[31] Geipel describes the caricature as "the least subtle and potentially most damaging form of cartoon; its basic techniques, its undertow of cruelty and derision, are the very taproots of all comic art." Geipel, at 21-22. Of Gerald Scarfe, described as "the most withering of contemporary caricaturists," it has been said, "If Scarfe couldn't draw, he'd be an assassin." *Id.* at 23.

[32] Hess & Kaplan, at 159-60.

[33] *Id.* at 161.

Several collections of modern political cartoons give valuable insights into the essence of the cartoonist's craft. Faithful to their English and American forebears, modern cartoonists recognize that their most potent weapon is the unambiguous attack. If "loose language or undefined slogans" are accepted as "part of the conventional give-and-take in our economic and political controversies," *Letter Carriers*, 418 U.S. at 284, exaggeration, burlesque and distortion are essential ingredients of the editorial cartoon. "Cartooning is not a fair art," according to Mike Peters of the Dayton, Ohio *Daily News*. "Most cartoonists like me—who like to attack—are like loaded guns. Every morning we start looking through the newspaper for a target to blast. That's our function." [34] Bill Sanders of the *Milwaukee Journal* deliberately chooses highly-charged emotional issues for his subjects: "I have done a lot of cartoons on abortion, gay rights, women's rights—in specific areas of real, live social issues, that people get very on edge about. . . . It makes people uncomfortable." [35] Cartoonist Scott Long captures the essence of the modern cartoon thusly:

> The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters.[36]

The modern cartoon continues its journalistic tradition by being an "attention-getting art," an image which

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[34] Westin (ed.), *Getting Angry Six Times A Week: A Portfolio of Political Cartoons* (Beacon Press: 1979), at 96.

[35] *Id.* at 3.

[36] Long, "The Political Cartoon: Journalism's Strongest Weapon," *The Quill*, Nov. 1962, at 57.

"distorts in order to hammer home what the artist regards as the essential truth about an individual." [37] Indeed, to the extent that political cartoons were perceived to lapse into a relatively tepid period, practitioners of the art mourned for their profession.[38]

B. Political Satire In Literature

Northrop Frye has written: "Two things, then, are essential to satire; one is wit or humor founded on fantasy or a sense of the grotesque or absurd, the other is an object of attack." [39]

In an elegant study, Edward Rosenheim, Jr. has made the same point:

> To return to the sources of our common feeling that we are in the presence of satire, there is one general quality which, although it has been given various names, seems most readily and widely recognized. This is the quality which, although the term may seem rather loose, we shall describe as *attack*. For in one way or another, satire seems

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[37] Press, at 74, 63. In 1954, Herblock drew Richard Nixon crawling out of a sewer to meet his welcoming committee, prompting Nixon to remark several years later, "I have to erase the Herblock image." But when the head of a San Francisco art exhibition ordered a lithograph of Nixon as a black-masked hoodlum removed from the exhibition, Nixon wired: "One of the most sacred precepts of our Anglo-American legal heritage is the right of individuals to criticize public officials." Keogh, *This Is Nixon* (G.P. Putnam's Sons: 1956), at 72, 73.

[38] Smith, "The Rise and Fall of the Political Cartoon," *The Saturday Review*, May 29, 1954 at 7-9, 28-29. Columnist Art Buchwald suggested a class action suit by himself and cartoonists Herblock, Bill Mauldin, Pat Oliphant and others for being "publicly humiliated" and for suffering "grievous professional injury" when they, unlike other journalists, did not appear on President Nixon's official "enemies" list. Buchwald, *Down the Seine and Up the Potomac* (G.P. Putnam's Sons: 1977), at 442-43.

[39] Frye, *Anatomy of Criticism* (Princeton Univ. Press: 1971), at 224, emphasis in original.

> always to treat an object of some kind in an unfavorable way.[40]

And, in distinguishing "between punitive satire and comedy," he adds: "All satire is not only an attack; it is an attack upon *discernible, historically authentic particulars*. . . . The reader must be capable of pointing to the world of reality, past or present, and identifying the individual or group, institution, custom, belief, or idea which is under attack by the satirist." [41]

Moreover, "all satire involves, to some extent, *a departure from literal truth* and, in place of literal truth, a reliance upon what may be called a *satiric fiction*." [42]

Passing for a moment satiric fiction, and the truth embedded therein, we examine briefly the nature of the satiric attack. The "typical emotion which the author feels and wishes to invoke in his readers . . . is a blend of amusement and contempt. . . . [W]hether it is uttered in a hearty laugh, or in that characteristic involuntary expression of scorn, the stillborn laugh, a single wordless exhalation coupled with a backward gesture of the head—it is inseparable from satire. Even if the contempt which the satirist feels may grow into furious hatred, he will still express his hatred in terms suitable, not to murderous hostility, but to scorn." [43]

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[40] Rosenheim, Jr., *Swift and the Satirist's Art* (The Univ. of Chicago Press: 1963), at 12, emphasis in original (hereafter cited as "Rosenheim").

[41] *Id.* at 25, emphasis in original. See also Highet, *The Anatomy of Satire* (Princeton Univ. Press: 1962) (hereafter cited as "Highet"), at 16: "[T]he type of subject preferred by satire is always concrete, usually topical, often personal. It deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils."

[42] Rosenheim, at 17, emphasis in original.

[43] Highet, at 21-22. The point is made in almost identical language with respect to the basic meaning "of satire" in the seventeenth and eighteenth centuries: "[T]he poet's task, like the orator's, was to arouse in his audience certain emotions about the subject of his poem. When scorn, hatred, or contempt was the

In making his attack, the satirist

> intends to shock his readers. By compelling them to look at a sight they had missed or shunned, he first makes them realize the truth, and then moves them to feelings of protest. Most satirists enhance those feelings by careful choice of language. They employ not only accurate descriptive words, but also words which are apt to startle and dismay the average reader. Brutally direct phrases, taboo expressions, nauseating imagery, callous and crude slang—these are parts of the vocabulary of almost every satirist.[44]

In short, "Satire is the literary equivalent of a bucket of tar and a sack of feathers." [45] The result is that the

> victims of true satire must "suffer," whether through their own injured awareness of assault or in the ridicule or hostility which the satirist produces in the minds of others. The ultimate wellspring of the satiric spirit is perhaps benign, and sin itself, rather than the sinner, may be the true object of the satirist's wrath. But the essence of the satiric procedure is attack, and the attack launched impartially against everyone is no attack at all.[46]

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emotion he wished to arouse, he was writing satire. The essence of the meaning of the word was simply 'a composition *against* someone or something'." Jack, *Augustan Satire: Intention and Idiom in English Poetry, 1660-1750* (Clarendon Press: 1952), at 98, emphasis in original.

[44] Highet, at 20. See also *id.* at 18. "Most satiric writing contains cruel and dirty words; all satiric writing contains trivial and comic words; nearly all satiric writing contains colloquial anti-literary words." Other comments are to the same effect: "[G]ood satire is, almost without exception, vivid, racy, and sensual. The satirist wants to project us into a situation that already exists, and, in order to do this, he must screw our senses up to a high pitch, must involve us with the milieu or the personality which he is describing. This is why satire often presents us with a series of vignettes: history seen by flashes of lightning." Lucie-Smith (ed.), *The Penguin Book of Satirical Verse* (Penguin Books: 1967), at 19 (hereafter cited as "Lucie-Smith"). See also Roth, *Reading Myself and Others* (Farrar, Straus & Giroux: 1975), at 48-49.

[45] Highet, at 155.

[46] Rosenheim, at 29.

The latter point was forcefully made by Alexander Pope himself: "General Satire in Times of General Vice has no force, & is no Punishment: . . . 'tis only by hunting One or two from the Herd that any Examples can be made. If a man writ all his Life against the Collective Body of the Banditti, . . . would it do the least Good, or lessen the Body?" [47]

Much of the satire discussed by the critics we have quoted, and much of Pope's, was "political" in that political figures were its targets. But we must not omit reference to the greatest body of purely political English satire was a series of open letters written between 1769 and 1772 to the *Public Advertiser* by the anonymous Junius. An ally of John Wilkes, Junius attacked George III and the Lord North ministry with a vengeance.[48] "It must be confessed that the famous *Letters*, great as is their talent, are unpleasant reading: venomous malignity and corrosive spite are qualities not beautiful to contemplate; and cold poison seems somehow to be more deadly than poison that is not so cold." [49]

The poems of the leading English satirists, and the *Letters* of Junius (who strongly supported the colonists in his attacks on the North administration) were well known in America and often imitated. Indeed, satire formed an important part of the vast outburst of political writing in the colonies during the revolutionary period. Professor Granger identified 530 satires during the

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[47] Letter from Pope to Arbuthnot, quoted in Mack, *Alexander Pope, A Life* (W. W. Norton: 1986), at 636 (hereafter cited as "*Pope Life*"). Pope reiterated this poetically in *One Thousand Seven Hundred and Thirty-Eight, Dialogue II*, quoted in *Pope Life*, at 710. This generalization must, however, be qualified, since Jonathan Swift, Pope's friend and ally in the fight against the corruption of his time, not only attacked particular individuals and groups, but satirized all mankind, as in Book IV of *Gulliver's Travels*.

[48] Letters of Junius (C.W. Everett, ed., London: 1927). An excerpt from his letters which may particularly interest the Court, addressed to Lord Mansfield and excoriating his conduct in libel cases, is reproduced at pages 15a-16a, *infra*.

[49] Walker, *English Satire and Satirists* (Octagon Books: 1965), at 217.

period 1763-1783, on both the Patriot and the Loyalist side: [50] "From the Juvenalian verse of Freneau and Odell through Trumbull's and Bailey's Rabelaisian caricatures to the seeming geniality of Hopkinson and the Swiftian bite of Franklin, this body of satire runs the rhetorical spectrum."[51] The tradition of American political satire thus antedates the Republic.

Since the object of satire's attack is to wound, it is not surprising that it often succeeds, although some targets are—or appear to be—unhurt. A few illustrations must suffice: "The various authors attacked in the *Dunciad* were angry at being, as they thought, treated unfairly. Their anger was not only understandable, but justified. Pope did not tell the truth about them." [52] Yet, Lord Hervey, as *Sporus* the victim of Pope's—and English literature's—most vicious satire, was, according to his biographer, unmoved.[53] While Beerbohm's parodies of their writings deeply hurt Kipling and Arnold Bennett, Henry James was highly appreciative and pleased.[54] Wolcott Gibbs' famous profile of Henry Luce in *Time*style ("Backward ran sentences until reeled the mind") was read by him "with the anguish of a man suspicious of humor and dreadfully concerned about his own image." [55]

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[50] Granger, *Political Satire in the American Revolution, 1763-1783* (Cornell University: 1960), at viii.

[51] *Id.* at 7, 8, 26.

[52] Sutherland, Jr., *The Art of The Satirist* (Univ. of Texas Press: 1965), at 11.

[53] *Epistle to Dr. Arbuthnot*, reproduced at page 14a, *infra*. See Halsband, *Lord Hervey Eighteenth Century Courtier* (Oxford: 1973), at 177.

[54] See Highet, at 145-46; Behrman, *A Portrait of Max* (Random House: 1960) (hereafter cited as "Behrman"), at 231-32.

[55] Swanberg, *Luce and His Empire* (Scribner: 1972), at 123. Referring to Luce's possible political ambitions, the profile concluded: "Where it all will end, knows God." See *id.* at 124.

A remarkable example of the susceptibility of even sophisticated public persons to satiric wounds is provided by the report that Gilbert and Sullivan's Sir Joseph Porter, K.C.B., a satire of William Henry Smith, the bookseller, who moved into politics and became First Lord of the Admiralty in Disraeli's 1887 Cabinet, "stunned Disraeli" (himself an author of political novels), who

We do not suggest that any of these victims would have sued their satiric tormentors if the law had enabled them to do so. But human nature is such that individuals who feel seriously aggrieved tend to counterattack with any weapon that comes to hand, and the prospect of a large damage award will encourage many satiric targets to sue, if the decision below is sustained.

When one looks to the motives of satirists—as does the Court of Appeals in this case—it is clear that they are usually, if not inevitably, moved by what the common law would describe as "malice." Professor Highet has written that, whatever additional motives a satirist may have, "he is always moved by personal hatred, scorn, or condescending amusement. Frequently he disclaims this, and asserts that he has banished all personal feelings, that he is writing only for the public good. But he always has a rankling grudge, however well he tries to conceal it, or a twitch of contempt, however gracefully he turns it into a smile." [56]

Often, there will be objective evidence of the satirist's personal ill feeling toward the object of his satire, even as history records that of past satirists toward their victims.[57] In many other cases, especially with regard to effective satire, a reasonable jury could, if permitted by the Court to do so, infer malice from the writing itself.

To recapitulate, satire regularly attacks and wounds individuals, often due to the personal ill will which the satirist bears toward his target. More often than not, therefore, the elements for a claim of intentional infliction of emotional distress will be present. Only the First Amendment can protect the writing and publishing of satire against this danger.

"said that *H.M.S. Pinafore* made him feel 'quite sick'." Highet, at 125.

[56] Highet, at 238. See also Rosenheim, at 181.

[57] For example, Pope's Portrait of Lord Hervey as *Sporus* "springs from an intense personal hatred"; longstanding feuds furnished the impetus for other attacks. See *Pope Life*, at 646; Beerbohm "loathed" Kipling. See Highet, at 145; Behrman, at 61-71.

Of course, "the constitutional protection for a free press [does not apply] only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right." [58] But for purposes of this case, it is sufficient that satire, such as we have been discussing, and especially political satire, is an expression of the writer's opinion. The satiric fiction, to which we referred at the outset, is the satirist's manner of expressing his vision of the truth.

"The satirical writer believes that most people are purblind, insensitive, perhaps anaesthetized by custom and dulness and resignation. He wishes to make them see the truth—at least that part of the truth which they habitually ignore." [59] To be sure, it is not "necessary that the satiric work contain an appreciable element of 'affirmation.' An art whose distinguishing effect is that of attack is almost inevitably more destructive than otherwise." [60] Satire is a "savage but useful art whose glory is not to proclaim truth but to destroy falsehood." [61] Thus, by eradicating falsehood and exposing sham, satire makes an indispensable contribution to political dialogue. As one of Shakespeare's Fools, Jacques, said:

> Invest me in my motley. Give me leave
> To speak my mind, and I will through and through
> Cleanse the foul body of th' infected world,
> If they will patiently receive my medicine.[62]

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[58] *Winters* v. *New York*, 333 U.S. at 510, reaffirmed in *Joseph Burstyn, Inc* v. *Wilson*, 343 U.S. 495, 501 (1952); see also *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977).

[59] Highet, at 19. "[S]atire is militant irony: Its moral norms are relatively clear, and it assumes standards against which the grotesque and absurd are measured." Frye, at 223. See also Sutherland, at 11; Lucie-Smith, at 14.

[60] Rosenheim at 180-81.

[61] *Id.* at 238. Thus, "Sporus is simply the climactic instance of a form of prostitution bedeviling the entire society that [Pope's] poem depicts." *Pope Life* at 646.

[62] Shakespeare, *As You Like It*, Act II, Sc. 7, ll.58-61.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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June 15, 1987

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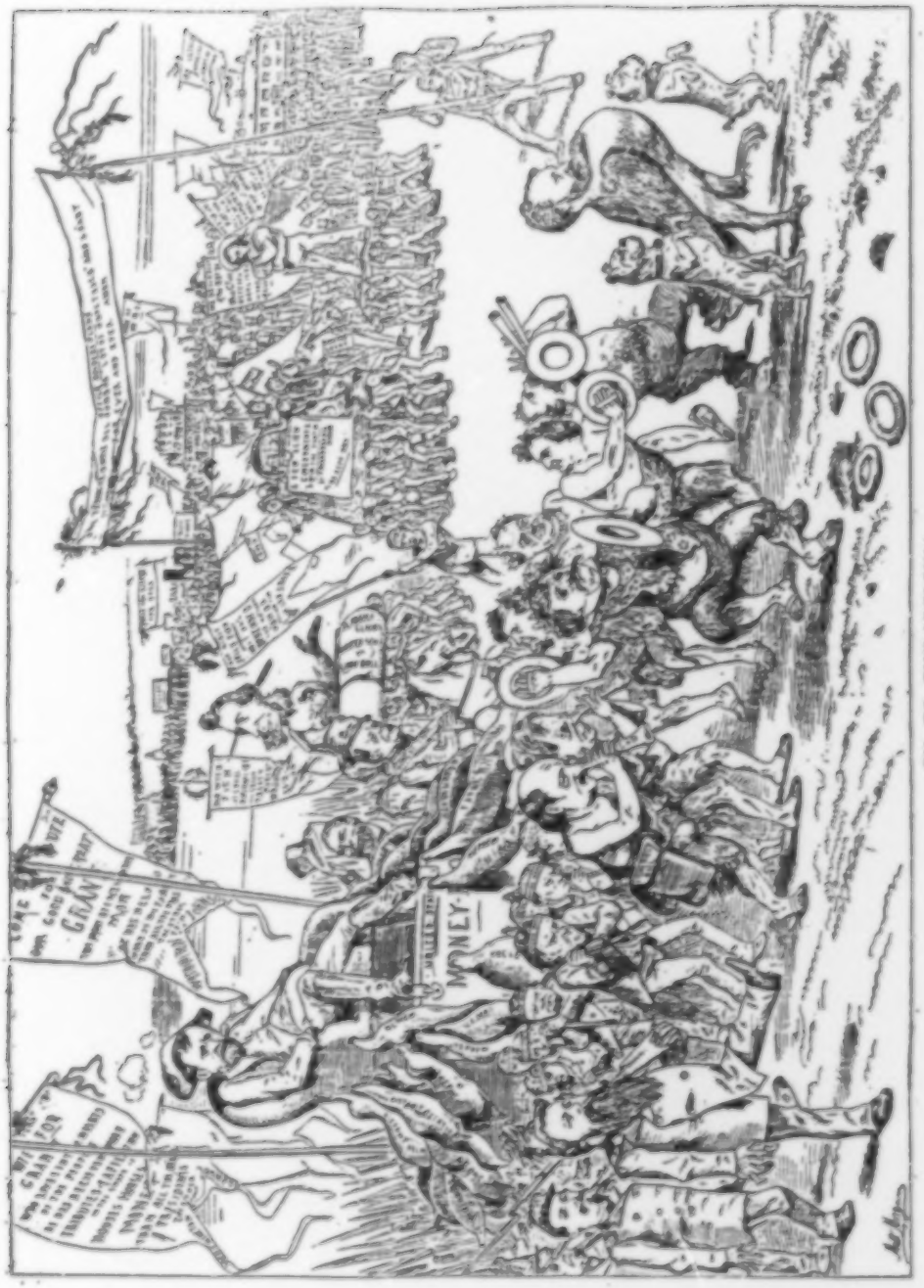
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APPENDIX

APPENDIX



Time, midnight.–*Scene*, New York City Hall.
Lady *******, "Out, damned spot! out, I say! . . . Here's the smell of the blood still: all the perfumes of Democracy will not sweeten this little hand. Oh! oh! oh!"



THE MARCH OF THE BREADLESS BRIGADE ON TO PHILADELPHIA!



A Group of Vultures Waiting for the Storm to "Blow Over"; Let Us Prey

4a




SEE! THEM COME.
It's Miss Boombah!
SIS BOOMBAH ?
Miss sis Boombah
10-5


SHE'S A RHODE ISLAND RED -- FROM PROVIDENCE -- NOBODY FROM PROVIDENCE SHOULD SEE ME!
WHY--?
OOG! WHO BEEN KEEPIN' FISH IN THIS BAG?

5a


BAMBI
JAMES WATT
SECRETARY OF THE INTERIOR
MARLETTE


PUT IT BACK, BERT...

6a



10/11/74



"NOW WE COME TO THE OFFICES OF THE HOUSE WAYS AND MEANS COMMITTEE, HEADED BY . . ."

7a

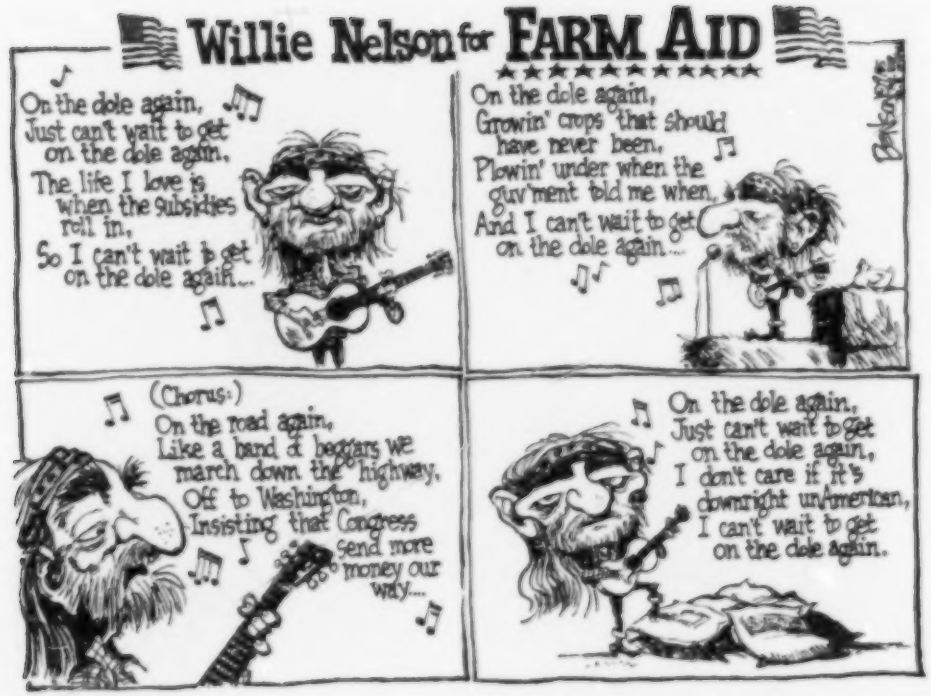






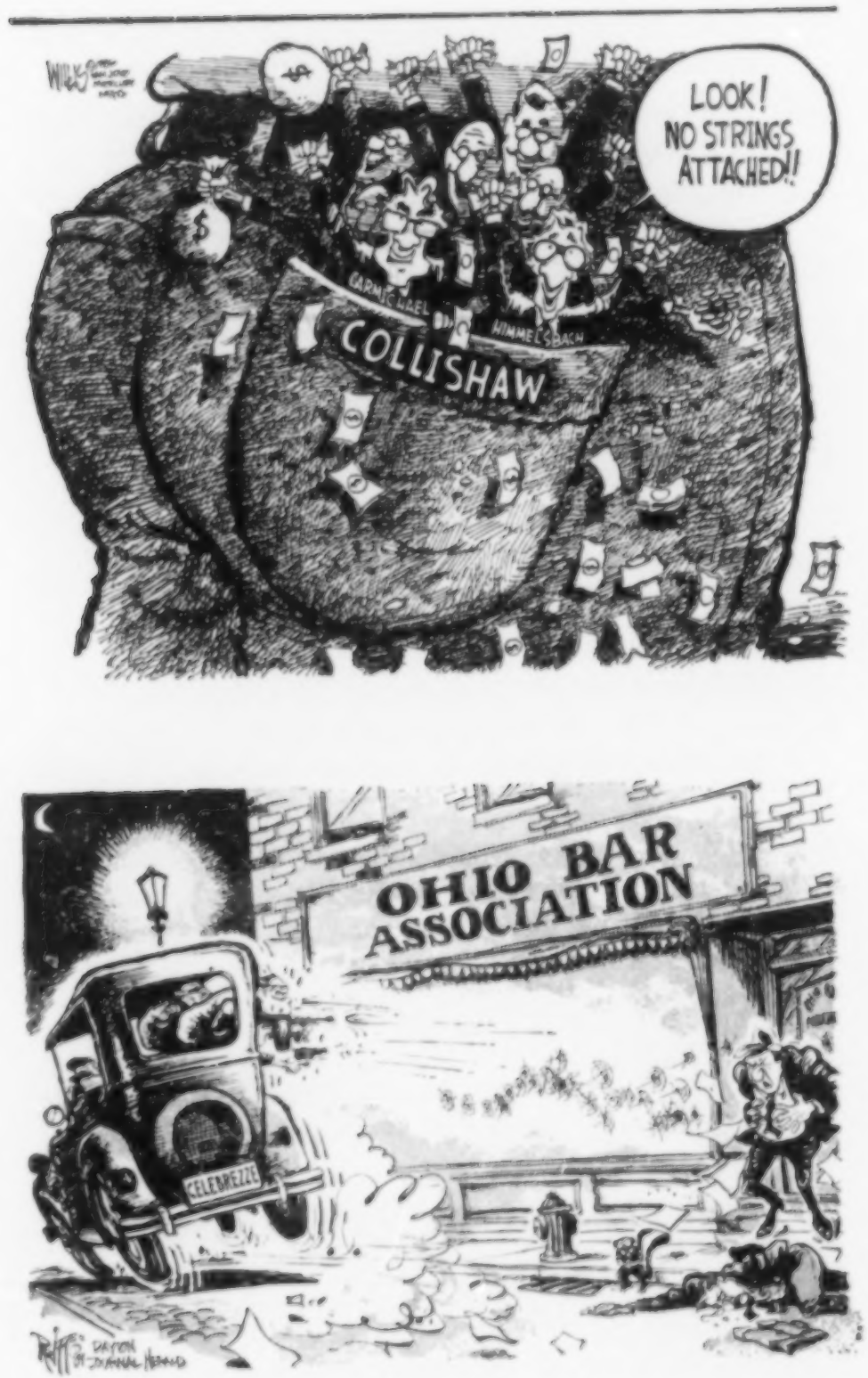


"I didn't leak anything to Chile . . . and it's unfair for the CIA to spy on me and discover that I did!"






HEY! THE BROAD DESERVED IT. SHE WAS COYOTE UGLY.
JUSTICE
SIGNE WILKINSON
LET'S ALL PRAY FOR OLD JIM.
THE IMPOTENT LITTLE WOMANIZER PROBABLY HOMOSEXUAL EMBEZZLER.


LOOK! NO STRINGS ATTACHED!!
GARMENDREZ
HIMMELSBACH
COLLISHAW
OHIO BAR ASSOCIATION
GELENDREZE
DAYTON DAILY JOURNAL HERALD

Page

1a. Drawing by Thomas Nast, September 19, 1868, published in *Harper's Weekly*

2a. Drawing by Matt Morgan, June 6, 1872, published in *Frank Leslie's Illustrated Newspaper*

3a. Drawing by Thomas Nast, September 23, 1871, published in *Harper's Weekly*

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11a. TOP

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BOTTOM

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Excerpt from A. Pope, *Epistle to Dr. Arbuthnot*, lines 305-333

Let *Sporus* tremble— A. What? that thing of silk,
Sporus, that mere white curd of Ass's milk?
Satire or sense, alas! can *Sporus* feel?
Who breaks a butterfly upon a wheel?
P. Yet let me flap this bug with gilded wings,
This painted child of dirt, that stinks and stings;
Whose buzz the witty and the fair annoys,
Yet wit ne'er tastes, and beauty ne'er enjoys:
So well-bred spaniels civilly delight
In mumbling of the game they dare not bite.
Eternal smiles his emptiness betray,
As shallow streams run dimpling all the way.
Whether in florid impotence he speaks,
And, as the prompter breathes, the puppet squeaks;
Or at the ear of *Eve*, familiar Toad,
Half froth, half venom, spits himself abroad,
In puns, or politics, or tales, or lies,
Or spite, or smut, or rhymes, or blasphemies.
His wit all see-saw, between *that* and *this*,
Now high, now low, now master up, now miss,
And he himself one vile Antithesis.
Amphibious thing! that acting either part.
The trifling head or the corrupted heart,
Fop at the toilet, flatt'rer at the board,
Now trips a Lady, and now struts a Lord.
Eve's tempter thus the Rabbins have exprest,
A Cherub's face, a reptile all the rest;
Beauty that shocks you, parts that none will trust;
Wit that can creep, and pride that licks the dust.

Excerpt from Junius, Letter XLI to the Right Honourable Lord Mansfield, 14 November 1770 (Everett, ed., pp. 180-181).

The doctrine you have constantly delivered, in cases of libel, is another powerful evidence of a settled plan to contract the legal power of juries, and to draw questions, inseparable from fact within the *arbitrium* of the court. Here, my Lord, you have fortune of your side. When you invade the province of the jury in a matter of libel, you, in effect, attack the liberty of the press, and with a single stroke, wound two of your greatest enemies—In some instances you have succeeded, because jurymen are too often ignorant of their own rights, and too apt to be awed by the authority of a chief justice. In other criminal prosecutions, the malice of the design is confessedly as much the subject of consideration to a jury, as the certainty of the fact. If a different doctrine prevails in the case of libels, why should it not extend to *all* criminal cases?—Why not to capital offenses? I see no reason (and I dare say you will agree with me that there is no good one) why the life of the subject should be better protected against you, than his liberty or property. Why should you enjoy the full power of pillory, fine, and imprisonment, and not be indulged with hanging or transportation? With your Lordship's fertile genius and merciful disposition, I can conceive such an exercise of the power you have, as could hardly be aggravated by that which you have not.

But, my Lord, since you have laboured, (and not unsuccessfully) to destroy the substance *of the trial*, why should you suffer the form of the *verdict* to remain? Why force twelve honest men, in palpable violation of their oaths, to pronounce their fellow-subject a *guilty* man, when, almost at the same moment, you forbid their inquiring into the only circumstance, which in the eye of law and reason constitutes guilt—the malignity or innocence of his intentions?—But I understand your Lord-

ship.—If you could succeed in making the trial by jury useless and ridiculous, you might then with greater safety introduce a bill into parliament for enlarging the jurisdiction of the court, and extending your favorite trial by interrogatories to every question, in which the life or liberty of an Englishman is concerned.

Musical Parody by Mark Russell

"Mr. Meese Is Coming To Town"

Oh you'd better be nice, not cranky and rude,
And don't ask for things like shelter and food
Mr. Meese is coming to town.

He's making a list of the food that he brings
To all of the hungry who live in Palm Springs
Mr. Meese is coming to town.

He knows if you're on food stamps—or on the welfare rolls

Look in your Christmas stocking and you'll find a lump of coal.

In the soup kitchen he's looking hard
For winos who carry a Master Charge card
Mr. Meese is coming to town.

And see the skid row residents have a gourmet treat

A silver ice-filled bucket of vintage Sneaky Pete.

Why stay at the Waldorf in a big double suite
You can save in the bowery and sleep in the street,
Mr. Meese has spoken
On those words he's chokin'
Mr. Meese is coming to town.